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No. _____

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In The

Supreme Court of the United States

OCTOBER TERM, 1982

MICHAEL O. MYERS,
ANGELO J. ERRICHETTI,
LOUIS JOHANSON,
Petitioners,

-vs-

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether A Due Process Defense To Conviction Is Mandated By The Fifth Amendment And, If So, Whether Petitioners' Assertions Of The Defense With Respect To The Conduct Of Law Enforcement Operatives In The ABSCAM Sting Operation Requires Dismissal Of The Indictment Or In The Alternative Suppression Of Evidence Derived From Unconstitutional Investigatory Methodology?

2. Whether the Speech or Debate Clause And The Doctrine Of Separation Of Powers Immunize Petitioner Myers From A Prosecution Stemming From A Sting Operation Directed At Congress Absent Any Probable Cause Or Predicate Indicating That Either He Or Other Congresman Were Involved In Criminal Conduct?

3. Whether The Admission Of Subsequent Criminal Acts As Proof Of Intent On An Earlier Occasion Is Violative Of The Right To A Fair Trial?

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In The

Supreme Court of the United States

October Term, 1982

MICHAEL O. MYERS

ANGELO ERRICHETTI

LOUIS JOHANSON

Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 3, 1982.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is appended to this Petition as Appendix A. That opinion is published at 692 F.2d 823 (2 Cir. 1982)

Jurisdiction

The jurisdiction of the Supreme Court to review the Final Judgment of the United States Court of Appeals for the Second Circuit is based on 28 U.S.C.A. Sec. 1254(1).

Constitutional, Statutory and Rule Provisions Involved

Petitioner seeks review of issues of law arising under 18 U.S.C.A. §201, 18 U.S.C.A. §371, 18 U.S.C.A. §1952, 18 U.S.C.A. §2 and U.S.C.A. Const. Amend. 5. They are appended to this petition as Appendix B.

I.

STATEMENT OF THE CASE

i.

Procedural Background

On May 27, 1980 Indictment No. CR-80-00249 was filed. That indictment charged petitioners Angelo Errichetti, Michael O. Myers and Louis Johanson with:

conspiracy in violation of 18 U.S.C.A. §371; bribery in violation of 18 U.S.C.A. §201(c) and §2 and, traveling in interstate commerce to facilitate unlawful activity in violation of 18 U.S.C.A. §1952 and 18 U.S.C.A. §2.[1] Howard Criden was also named in the indictment.

A pretrial motion to dismiss was denied. The Second Circuit affirmed that denial in an opinion which discussed objections to the prosecution based on the speech or debate clause and other related issues. United States v. Myers, 635 F.2d 932 (2 Cir. 1980). A pretrial decision was also made to conduct an evidentiary hering respecting due process concerns subsequent to trial. Trial ultimately commenced on August 11, 1980 before the Honorable George C. Pratt, U.S.D.J. and a jury. Thereafter, on August 29, 1980 guilty verdicts were returned as to petitioners with respect to each count in the indictment. On August 13, 1981 Judge Pratt imposed sentence on petitioners. Judge Pratt

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[1] Petitioner herein specifically adopt all arguments raised in the petition for certiorari to be filed on behalf of petitioner Howard L. Criden.

imposed aggregate sentences of three years imprisonment on petitioners Myers and Johanson and an aggregate sentence of six years imprisonment on petitioner Errichetti.

Subsequent to trial, an extensive hearing was conducted before Judge Pratt respecting due process issues. On July 24, 1981 Judge Pratt issued an opinion denying any relief to petitioners on due process grounds. See United States v. Myers, 572 F.Supp. 1206 (E.D.N.Y. 1981). Timely notices of appeal were filed respecting issues raised both within the trial and the due process hearing. On September 3, 1982 the Second Circuit affirmed petitioners' convictions.

ii.

Introduction

This petition stems from the ABSCAM "sting operation" perpetrated upon petitioners by the Federal Bureau of Investigation. The Factual Background set forth herein incorporates events relevant to this action as these events were developed at both trial and the subsequent due process hearing. The basic issue to be determined by this Court is whether the ABSCAM investigatory methodology reached the "demonstrable level of outrageousness" requisite

to a finding that it violated due process. **Hampton v. United States, 425 U.S. 484, 495 n.7 (1976).** What has been said thus far respecting the magnitude and significance of the due process issue is not intended to obscure the examination of other claims herein relating exclusively to the primary right at issue in every appeal from a criminal conviction, viz. the general right to a trial free of serious error and unfairness.

The due process concerns impact upon two areas. The violations relate to disregard of safeguards designed to ensure that law enforcement methodology does not rise to a level of outrageousness which is more deleterious to the public good than the crimes sought to be prevented and to making certain that all investigations are supervised and documented in a fashion which facilitates cogent judicial scrutiny. With regard to documentation and supervision, failings in this area acted in this case to preclude any reliable determination by a jury of the nature of interaction between law enforcement operatives and the unwitting petitioners. The violations which we allege must

be remedied by provision of relief to petitioners and articulation of reasonable guidelines to be applied in judicial review of future investigations.

iii.

ABSCAM - Its Genesis, Growth And Development

a. Introduction

The ABSCAM operation commenced in January of 1978. (PDP3.185-1 to 5). A front operation was used by the FBI to establish the charade of the existence of a rich Arab Sheik who was willing to finance various projects. (T17-1-4 to 8). The fictitious sheik was represented as having money to invest in projects proposed by persons who could deliver to him politicians who would become his friends. (NYDP Ex.58). The representatives of the Sheik, who were in reality undercover FBI agents and a paid informant (Melvin Weinberg), would then prepare the politican to accept money before the video-tape cameras. In connection with this plan, the ABSCAM operatives were instructed to turn away individuals who proposed wholly legitimate ventures. (T1714; T1715). Moreover, assuming that an illegitimate proposition was made, the ABSCAM operatives

were instructed to limit any inducements to amounts which would comport with sums likely to be offered in the real world.

Approaches were initiated by Weinberg to various individuals whom he perceived to have the abilty to lure public officials. Weinberg began this process by violating the first instruction, viz. to refrain from attempts to corrupt persons who proposed legitimate deals. (NYDP 4281 to 4283). He also continually offered inducments which are not likely to occur within a real world situation, offering as much as $42,000,000 to William Rosenberg for his participation in doctoring stolen or forged securities. (NYDP4284 to 4287). That offer was in addition to an offer to finance a legitimate project. (NYDEP4282-3 to 5). Weinberg also asked Rosenberg for $15,000. This act was the beginning of Weinberg's double dealing and attempts to make side money. (NYDP 4388-24).

In December of 1978, Weinberg met Errichetti. Weinberg's introduction to Errichetti sparked the phase of ABSCAM which gave rise to the instant prosecution. None of the individuals herein were believed to be corrupt prior to the approach to them by the ABSCAM operatives. In

short, the "sting operation" designed to ensnare persons such as petitioner Myers was not premised on probable cause or any form of suspicion of past corruption. The investigation was premised upon determining whether promises of investments in the public officials' home districts and payments in amounts ranging between $50,000 and $100,000 would be sufficient to prompt the politicians to promise to perform official acts in an influenced manner. Weinberg's role was to fashion a meeting at which the politician would be prepared to state before the cameras that he would perform official acts in return for the money. (T.1066-1067).

b. The Manner Of Recruitment Of Melvin Weinberg And His Conduct

Weinberg's involvement in ABSCAM stemmed from a conviction in Federal Court in 1977. (T1587-15 to 20). Weinberg was convicted of mail fraud, wire fraud and conspiracy. (T1587-24; T1687-18 to 22). His sentence for the offenses, viz. a three year jail term, was modified to probation because of his agreement to work for the FBI as a paid informant. (T1588-18 to 21).[2] The deal was that

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[2] Weinberg defrauded various individuals of

Weinberg would "get four cases" for the government in return for probation. (T1690-2 to 3). Thereafter, in 1978 he became a paid informant on an ongoing basis. Weinberg received a monthly salary from the FBI for his efforts.

Weinberg's activities as a paid informant in 1978 were a continuation of cooperation which he provided to the FBI in the 1960's. (PDP3.65-1 to 10). Weinberg worked for the FBI during the period of time in which he was operating the fraudulent schemes which ultimately led to his apprehension and conviction. (PDP3.67-17 to 24). Weinberg lied to the FBI about his personal activities. (PDP3.70-17 to 19). Consistent with his past, Weinberg engaged in double dealings, i.e. attempts to generate personal gain, while he was being paid by the government to make cases in ABSCAM. This double dealing included solicitation of money and gifts which were not reported to his superiors.

In addition to having a private plane, yacht, office and luxurious townhouse at his disposal, Weinberg was paid $133,000 (T2020-2 to 20; T2023-13). Weinberg is at this

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$200,000. As part of his arrangement with the government, he was not required to pay any restitution to the victims. (T1687-10 to 13).

point in time receiving $3,000 per month as a paid informant and thus his compensation for ABSCAM is approaching $200,000. Weinberg expects to receive a substantial bonus subsequent to completion of his testimony and other participation in the trials. (T1853). Interestingly, Weinberg has not filed tax returns for the years 1977, 1978 and 1979. (T1802-2 to 23). Weinberg received a $15,000 reward for one transaction. (D.P.Ex. 59). That reward was discussed with the prosecutor (Puccio) and clearly stimulated Weinberg toward zealous procurement of other public officials. A book publisher has also promised Weinberg a $100,000 advance for a book on his role in ABSCAM. (T1972-6 to 13). He has already received $15,000. Weinberg also expects to reap profits from a film contract. (T1972-2 to 14).

To facilitate the making of cases, Weinberg selectively recorded conversations. It was not until April 1979, five months after he met Errichetti, that Weinberg was even instructed to record all conversations. (Jenrette Tr.). He also erased portions of recordings and distorted the contents. (T1638-7 to 11; T1956-22 to 25; NYDP916 T10422; NYDP Ex.79). Indeed, in one circumstance, it was necessary

for Weinberg to destroy certain tapes. He claimed at trial that the tapes were stolen. (T1839-22 to 25). Although the tapes were allegedly made within a week of their disapperance, Weinberg could not remember the names of the subjects recorded or the topics of the conversations. (T1840-3 to 9).

We iterate that Weinberg was paid "to make cases." (T1690-2 to 3). In June of 1979, a tape was made of a prep session at which Weinberg prepared Senator Williams to perform for the camera. The tape was scrutinizd by Weinberg's superiors and he was admonished not to lead politicians into incriminatory activity. (NYDP350-1). Thereafter, he was severely criticized on August 9, 1979, for this form of coaching by Edward Plaza and Robert Weir, Assistant United States Attorneys from the Newark office. (NYDP1206-12). Significantly, from that point forward, no tapes were made of prepatory sessions relating to the public officials. Moreover, Weinberg at no time thereafter participated in any such session with a politician. He recruited Errichetti and later Criden to perform this function.

iv.

Factual Background

a. The Initial Transaction In Myers

In July of 1979, defendant Criden was approached by two individuals, Messrs. Niefeld and Berman, regarding development of a parcel of real property in Atlantic City. These individuals were seeking assistance in securing financing for a casino-hotel to be constructed on the property. (PDPl.5-1 to 5). Criden was given authorization to seek financing and a potential buyer for the completed casino-hotel. (PDPl.5-6 to 10). Criden informed petitioner Johanson, his law partner, of the arrangement. (PDPl.5-11 to 12). Thereafter, Johanson discussed the project with an individual named Meiler. (PDPl.5-14 to 15). Meiler suggested that his neighbor, petitioner Errichetti, might be of assistance. (PDPl.5-16 to 21; PDP2.5-14 to 18). Arrangements were made to present feasibility studies to Errichetti. To this end, a meeting was convened at Meiler's home. (PDPl.6-1 to 3; PDP2.5-20 to 22). The meeting was attended by Johanson, Errichetti and Meiler. (PDP2.5-20 to 22).

Errichetti reviewed the materials and agreed to seek financing. In return, he was offered an interest in the project. Errichetti then placed a telephone call to Weinberg. Johanson spoke to Weinberg. (PDP2.5-23 to 25). Weinberg stated that he represented a wealthy Arab Sheik and would discuss provision of financing for the project. (PDP1.6-13 to 18). A meeting was arranged for July 26, 1979, in Fort Lauderdale, Florida. Prior thereto, Johanson verified Weinberg's representation that the sheik had $400,000,000 on deposit at the Chase Manhattan Bank in New York. (PDP2.7-10 to 20).

On the evening of July 25, 1979 Meiler, Errichetti, Johanson and Criden booked passage on a commercial airline flight to Fort Lauderdale. (PDP1.6-19 to 22). Criden and Errichetti were introduced to one another for the first time on the plane. (PDP1.127-14 to 19). Anthony Amoroso, an FBI agent posing as Anthony DiVito, and Weinberg met the group at the airport. (PDP1.6-23 to 25). The following day, a meeting was convened aboard a yacht utilized by Amoroso and Weinberg as part of the "sting operation." (PDP1.7-9 to 11).

Johanson and Criden made a presentation to Amoroso and Weinberg concerning financing of the wholly legitimate casino-hotel project. (PDPl.7-20 to 22; T579-l4 to l9). Amoroso and Weinberg indicated that the sheik would be interested in this project. (T923-lo to l3). Weinberg stated that he expected to secure the approval of the sheik within 30 to 60 days. (PDPl.8-3 to l2). The potential gain to Criden and Johanson would have been "anywhere from $3,500,000 to $5,000,000".(PDPl.9-8 to 9). A second conversation ensued on the upper deck among Weinberg, Errichetti, Amoroso and Criden. (Tr.581-6 to 10). Amoroso stated to Errichetti that the Sheik was concerned about obtaining asylum in the United States because he anticipated that he might shortly be forced to emigrate. (T58l-l6 to 20).

On the return flight to Philadelphia, Errichetti stated to Criden that his association with the Sheik's representatives was "like a fantasy, a fairy tale." (PDP1.9-12 to 15). He indicated that the Sheik would pay "substantial fees" to meet public officials with titles. (PDP1.9-17 to 21; PDP-1.10-1 to 5). Errichetti stated that

the Sheik merely wanted to be associated with public officials and there were "no strings attached." (PDP1.117-14 to 15).

Criden discussed the matter of introductions to politicans with his law partners, including Johanson. (PDP1.11-16 to 19). Johanson occupied a seat on the Philadelphia City Council and had significant political assocations. (PDP1.11-17 to 19). Criden requested that Ellis Cook, a member of the law firm research the propriety of such introductions. Cook concluded that such introductions were wholly proper. (PDP1.12-6 to 10).[3]

Johanson contacted petitioner Myers. (T2708-4 to 13). Johanson described to Myers the "rich Arab Sheik" and the casino-hotel project which was presented to the Sheik's representatives. (T2709-16 to 19). Johanson then expressed to Myers the offer conveyed to him by Criden that the Sheik would pay $100,000 in return for introductions to important persons. Johanson unequivocally stated to Myers that there

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3 Cook, an unindicted co-conspirator, testified at trial under a grant of immunity. Cook stated on the government's case-in-chief that it was the understanding of the group that there was no quid pro quo.

would not be any quid pro quo. (T2709-12 to 16). Johanson iterated that Myers would not be required to do anything in return for the money. (T2712-1 to 16).

Johanson informed Criden that Myers was willing to meet with the sheik. Prior to the day of the meeting, Errichetti was told by Weinberg that he (Weinberg) would meet with Myers to prepare him for his conference with the Sheik. (PDpl.119-19 to 25). Weinberg altered these plans and informed Errichetti that he should coach Myers. (PDPl.120-14 to 18). Errichetti pulled Myers aside and provided him with the prepatory speech given to Errichetti by Weinberg. (PDPl.120-14 to 18). Errichetti emphasized, as he believed was his understanding with Weinberg, that any representations by Myers "would all be falsehoods." (PDPl.120-14 to 18).

Thereafter, Errichetti informed Myers that the sheik would not attend the meeting and one of his representatives would substitute. Myers expressed concern because he was previously told that he could talk about any topic since the sheik did not understand the English language. Errichetti retorted:

> Tell them to do anything they want, don't worry about that. You don't ever have to worry about the Sheik coming to America because Mel already told me if he has to leave his country arrangements have been made in South America and they never intend to come to America. (T2718-20 to 25). Cf. (PDP1.121-17 to 25).

The meeting convened and Myers performed in a manner consistent with his instructions. (T2721-5 to 2739-17). When the meeting concluded, Myers was handed an envelope by Amoroso containing $50,000. (T2739-18 to 21). After he departed from the room, Myers gave the envelope to Errichetti. (T2739-18 to 25). Myers never saw nor spoke to Errichetti again in connection with this or any ABSCAM transaction. (T2740-2).

b. The Second Transaction In Myers

On January 24, 1980 Myers received a telephone call from Criden. Myers was invited by Criden to meet with a "new" representative of the Sheik, Mr. Cohen. Myers was told that Cohen was interested in investing money in

Philadelphia. (T2744-1 to 3). A meeting was convened at the Barclay Hotel. Mr. Cohen was in fact Michael Wald, an FBI agent. (T2747-12 to 15). Myers was of the view that the same ground rules applied as were applicable at the prior meeting, namely that he "had to impress them that [he] was a strong guy the same way [he] did back in the August meeting." (T2747-22 to 25).

The meeting was attended by Myers, Wald and Haridoplos, who was also an FBI agent. Myers, during the meeting, told Wald and Haridopolos that on the previous occasion in which he met with the Sheik's representatives, he did not receive the amount of money he anticipated. (T2779-8 to 12). Myers returned to the Barclay Hotel the following evening subsequent to a call from Wald. (T2795-16 to 17). Myers at the meeting, consistent with his understanding that he was play-acting, indicated to Wald and Haridopolos that "he could handle any problem that could ever exist." (T2718-23 to 25).

Petitioners were convicted of each of the counts in the indictment. The Second Circuit affirmed the convictions. This petition follows.

II.

The Jurisprudential Significance Of The Arguments To Be Raised Before The Court

Petitioners Myers, Errichetti and Johanson have selected three issues to be raised before this Court. The issues relate to: (1) recognition and application by this Court of the so-called due process defense to conviction; (2) the nature and scope of Congressman Myers' immunity under the Speech and Debate Clause; and (3) the admissibility of subsequent criminal acts into evidence as proof of intent on an earlier occasion. The national and juridical importance of these issues cannot be gainsaid. These issues arise within the context of a challenge to an unprecedented expenditure of Executive Branch resources to determine the corruptibility of Congressmen who had not previously demonstrated any moral frailty or breach of fiduciary duty. These claims are outlined below and detailed at length in the reasons for granting the writ.

a. The Due Process Violation

This Court must issue a statement respecting the existence or non-existence of the "due process defense" to conviction. And, in the event that this Court firmly endorses the vitality of such a defense, a definition as to its nature and scope must be set forth. Presently, the precedential basis for the defense in the federal system lies within the concurring opinion of Justice Powell in Hampton v. United States, 425 U.S. 484, 495 (1975). In Hampton Justice Powell expressed the view that "[p]olice over-involvement in crime [could] reach a demonstrable level of outrageousness [sufficient] to bar conviction." Id. at 495 n.7. We believe that the Constitution mandates recognition of the defense since it is the exclusive means to remedy unsavory and outrageous law enforcement methodology.

In denying petitioners relief on due process grounds, the Second Circuit rejected the defense. The Court stated:

> In assessing this collection of claims, we acknowledge intimations in decisions of the Supreme Court that the due process requirement of fundamental fairness may have a special pertinence when Government creates

> opportunities for criminal conduct...At the same time, we recognize that, with the exception of a decision by a divided panel of the Third Circuit, United States v. Twigg, 588 F.2d 373 (3 Cir. 1978), convictions have not been invalidated by federal appellate courts on grounds of excessive government involvement...United States v. Myers, 692 F.2d 823, 837 (2 Cir. 1982).

The Second Circuit further noted that in Archer v. Commissioner of Corrections, 646 F.2d 44, 47 (2 Cir. 1981), cert. den. 454 U.S. 851 (1981), it rejected "the due process claim" and this Court denied certiorari. Consistent with the importance of this case and the ambiguous precedential value of a denial of certiorari, the court chose to analyze the facts of the instant matter and issue a finding with respect to whether a due process violation inhered. Despite evidence clearly establishing government over-reaching and creation of crime, the court stated "[w]hatever may be the due process limit of governmental participation in crime, it was not reached here." 692 F.2d supra at 837.

Contrary to the decision of the Second Circuit herein, the majority of State courts addressing this issue within the last several years have recognized that there is no value to society in prosecutions that result from government conduct which is as outrageous as that engaged in by the subject of the investigation.[4] The highest value to society, with respect to the administration of criminal justice, is in ensuring that the techniques employed by law enforcement are fair and rational and bear a reasonable relationship to the evil sought to be uprooted. Where government resorts to conduct more offensive than that of the criminal element, the greatest need for deterrence relates to prevention of a recurrence of the government's

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4 See New Jersey v. Molnar, 81 N.J. 475, 484 (1980); Norman v. Texas, 588 S.W.2d 340, 346 (Ct. App. 1973); Pennsylvania v. Jones, 363 A.2d 1281, 1284 (Super. Ct. 1976); Michigan v. Wisneski, 292 N.W.2d 196, 198 (Ct. App. 1980); North Dakota v. Berger, 285 N.W.2d 533, 539 (Sup. Ct. 1979); Ohio v. Metcalf, 396 N.E.2d 786, 791 (Ct.App. 1977); Minnesota v. Ford, 276 N.W.2d 178, 182 (Sup. Ct. 1979); Bruce v. Alaska, 612 P.2d 1012, 1014 (Sup. Ct. 1980); Utah v. Taylor, 599 P.2d 496, 503 (Sup. Ct. 1979); California v. McIntire, 591 P.2d 527, 528 (Sup. Ct. 1979).

acts as opposed to mere apprehension of the criminal. ABSCAM was such an example of outrageous and unacceptable law enforcement.

The so-called due process form of the entrapment defense objectively focuses upon investigatory tactics and the affect that these tactics might have on an unwary innocent person. Stated somewhat differently, the objective entrapment defense does not scrutinize the predisposition to commit crime or lack thereof of the defendant. The defense is focused upon the interest in structuring investigations which do not have the capacity to bring about unreliable and undesirable results.

This Court is compelled by the Constitution to identify the defense and determine whether its application to this case renders the convictions a nullity. This Court is the ultimate arbiter of disputes respecting the substance of the Bill of Rights. If the due process defense exists within our federal Constitution, it exists for all whether the situs of a prosecution is in a state or federal court. As importantly, it shields all citizens from improper governmental conduct without respect to the particular status of a given citizen.

b. Congressman Myers' Immunity Based On The Speech Or Debate Clause And The Separation Of Powers Doctrine

In United States v. Myers, 635 F.2d 932 (2 Cir. 1980) (hereinafter Myers I), a panel of the Second Circuit considered the Speech or Debate clause and Separation of Powers doctrine issues implicit in the ABSCAM prosecution insofar as it reached Members of Congress. The Myers I Court received the issue as part of a pretrial appeal of denial of a motion to dismiss the indictment. The Court heard argument and considered substantial briefs. The panel's opinion disposed of those issues unfavorably for petitioner Myers. Those same issues were raised as part of the post-conviction appeal of Congressman Myers. It was hoped that the arguments would persuade the Court to reexamine its conclusions in Myers I, supra, and vindicate the critical constitutional interests implicated by this unprecedented prosecution.

However, in its second opinion below (hereinafter Myers II), the court iterated its view that "members of Congress enjoy no special constitutional rule that requires prior suspicion of criminal activity before they may

be confronted with a governmentally created opportunity to commit crime." 692 F.2d supra at 835. It is submitted that this Court must elucidate the nature of the Speech or Debate Clause and the Separation of Powers doctrine in a fashion which corrects the perception of the Myers I and Myers II courts. These provisions of the Constitution must be upheld as an effective shield against the form of arrogant intimidation of Congress by the Executive demonstrated within ABSCAM.

The investigation of one branch of our tri-partite government by another, referred to aptly by the Myers I Court as a "maneuver", implicates the core values of our constitutional scheme. The framers of the Constitution labored hard to erect a system of checks and balances to protect each branch from encroachment by the others. See Federalist No. 48 (Cooke Ed.). The Speech or Debate clause was insisted upon as one such form of security. The clause was drawn from the English Parliamentary Privilege won by the Parliament in the English Bill of Rights of 1689. The English Parliamentary Privilege capped the struggle of the Commons over successive monarchs who "utilized the criminal and civil law

to suppress and intimidate critical legislators." United States v. Johnson, 383 U.S. 177, 178 (1966). Lifetime tenure for federal judges (with salary protection) and the concept of "Executive Privilege" are illustrations of "practical security" imbedded in our system for the protection of the other two branches.

Although this Court has not interpreted the Speech or Debate clause to insulate Members of Congress from bribery prosecutions, it has generously construed the clause to prevent any use whatever of past legislative acts or the motivations therefor. See, United States v. Helstoski, 442 U.S. 477 (1979). It is abundantly clear in the instant case that the indictment was returned by a grand jury which depended heavily upon protected material furnished it under its subpoena power. Petitioner Myers asserts again that the indictment itself violated his rights under the Speech or Debate clause. See United States v. Helstoski, Crim. No. 76-201 (D.N.J. Feb 27, 1980) (unpublished) (Dismissing the Helstoski Indictment on remand on this ground).

As one of the checks and balances of our constitutional system, the Speech or Debate clause cannot be left as shallow as it has been demonstrated to be in the trials of the ABSCAM Members of Congress. To breath some life into the clause, this Court must develop a corrollary principal of constitutional law. In this petition, we specifically request that this Court find as an aspect of Separation of Powers some requirement of probable cause or reasonable suspicion to be prerequisite to the application of an undercover sting operation directed by the Executive branch against members of the Legislative or Judicial branches. This would draw a reasonable compromise between the English rule of absolute privilege from criminal prosecution and this Court's present position that members of the Congress not be absolutely immune from prosecution for bribery.

c. Admission Of Subsequent Acts As Proof Of Intent On A Prior Occasion

At trial, the court instructed the jury that the conspiracy charged in the indictment was limited to "[conduct] relating to Congressman Myers and the immigration, residency and citizenship status of the

[fictitious] sheik." (T4060). The alleged object of the conspiracy was to involve Myers in bribery or acceptance of a gratuity. The trial court specifically stated that petitioners were not charged with a conspiracy which encompassed "any other Congressmen; any Senators; any hotel projects or zoning problems in Philadelphia; any gambling casino projects in Atlantic City; any port develoment projects in Philadelphia, any dealings with organized crime, unions, or local or state officials, or any other matters." (T4060). On the basis of the analysis adopted by the court, the conspiracy charged in the indictment terminated on August 22, 1979, immediately after the meeting at JFK Airport and division of the $50,000 received by petitioner Myers in connection therewith. No other proof of concerted conduct involving Myers, Errichetti, Johanson and Criden subsequent to that date was adduced at trial.

The court's instruction to the jury setting forth the parameters of the conspiracy was prompted by admission into evidence of acts of petitioner Myers and Criden which occurred subsequent to August 22, 1979. The court admitted evidence that Criden and petitioner Myers met with new representatives of the Sheik five months

after termination of the conspiracy. Those meetings incorporated the extraneous and inflammatory matters which the court was compelled to inform the jury were outside the conspiracy charged in the indictment. Those extrinsic acts were proffered by the government as proof of petitioner Myers' and Criden's criminal intent respecting the earlier transaction. (TG4061). Since the conspiracy was terminated, these acts were concededly not in furtherance of it nor bore any relationship to it. Those acts also bore no relationship to the substantive bribery count.

Admission of the subsequent acts as proof of petitioner Myers' intent respecting the conspiracy and bribery counts charged in the indictment was clearly erroneous and in the context of this case denied petitioners a fair trial. The evidence merely tended to demonstrate a propensity to commit crime, which prejudiced each defendant at trial. In its opinion below, to avoid any ruling respecting the admissibility of subsequent acts as proof of intent on an earlier occasion, the Second Circuit disagreed with the trial court as to the date when the conspiracy terminated. In that fashion the Court sidestepped an issue of great jurisprudential significance in the context of

appropriate circumscription of use of "other crimes" evidence. Subsequent acts are not probative of intent on a prior occasion. This Court must issue an opinion respecting the clear jeopardy to a defendant's rights which such evidence poses when admitted into a criminal trial.

Reasons For Granting The Writ

Point I

CERTIORARI SHOULD BE GRANTED TO PERMIT THIS COURT TO DETERMINE WHETHER A DUE PROCESS DEFENSE EXISTS WITHIN OUR CONSTITUTION. IF SUCH A DEFENSE IS FOUND TO EXIST THIS COURT MUST SCRUTINIZE THE TACTICS UTILIZED BY THE GOVERNMENT AND STATE WHETHER THE OVER-REACHING AND CREATION OF CRIME WHICH EARMARKED THE ABSCAM INVESTIGATJION VIOLATED PETITIONERS' RIGHTS REQUIRING DISMISSAL OF THE INDICTMENT OR IN THE ALTERNATIVE SUPPRESSION OF ALL EVIDENCE DERIVED FROM ILLEGAL TACTICS.

The Second Circuit erred in ruling that the ABSCAM investigation was not so outrageous as to violate the petitioners' due process rights. Preliminarily, we emphasize that it is our view that a due process defense is mandated by the Constitution. And, recognition of the defense requires reversal of petitioners' convictions. We predicate our claim as to a due process violation on two combined bases. The first basis of our claim relates to the generally outrageous and unconscionable nature of the investigation which had the effect of creating as opposed to ferreting out crime. The second basis of the claim is that purposeful defects in the government's investigatory methodology were such that it placed petitioners in the posture of being unable to adequately defend against the charges at trial. This result stems from manufacture by the government of inculpatory evidence in conjunction with purposeful suppression of indicia of innocence central to a fair assessment of the events by a trial jury. And, even assuming that indicia of innocence was negligently as opposed to purposefully suppressed, the injury and necessity for remedy are no less compelling. The tactics from which

this combined claim stem are: (1) the targeting of the legislative branch without probable cause; (2) offers of inducements in surrealistic amounts; (3) erasure and destruction of tapes; (4) selective recording of conversations; (5) inadequate documentation of events by FBI personel; (6) specific failures respecting recording conversations involving Weinberg and middlemen (petitioner Errichetti and Criden); (7) the general failure to supervise Weinberg; (8) permitting Weinberg to engage in double dealing; (9) offering Weinberg huge sums of compensation, including bonuses, for making cases and testifying at trial; and (10) use of a personage such as Weinberg at all to "sting" a United States Congressman.

We submit that this Court must issue a clear statement which will preclude a future investigation which has as its parameters only the imagination of particular governmental operatives and paid informants.

i.

The Due Process Focus

The interest of preventing the manufacture or instigation of crime must be susceptible to vindication by virtue of a challenge to the jury's verdict and the indictment itself under the broad protections of due process. There are recognized boundaries to investigatory tactics in a free society that is committed to protecting the rights of all of its citizens from overreaching and abusive prosecution of criminal causes.5

The due process test is more difficult to apply than the subjective test of entrapment (which focuses upon the predisposition of the defendant) but at the same time is even more vital to a free society since it acts essentially as a limitation on the police power of the state. The liberty vs. security balance inherent in the due process test is one that American courts must draw in a host of other

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5 It is now well-recognized that only a three justice plurality suggested otherwise in **Hampton**; two justices concurring said they would recognize a due process defense independent of entrapment in an appropriate case and three justices said they would have applied such a defnese to **Hampton** itself. Justices Stevens and O'Connor have not expressed their views on the matter so that at least five and possibly seven justices have stated that a due process defense of the kind outlined herein is valid at least for the federal courts.

criminal law issues. It is one which we are reminded in each setting depends upon the "totality of the circumstances." The interest in this case is in determining the balance where the object is a criminality test aimed at Congress. In this context, we emphasize that there was no report of imminent danger being acted upon by the ABSCAM investigatory crew nor any suspicion of widespread corruption in the Congress requiring drastic law enforcement efforts.

Under the fundamental fairness and totality of the circumstances approach, the ABSCAM investigation exceeded the police power of the federal government. In general, the central due process violation is the same concern that lies at the core of the entrapment defense itself: the investigation in the instant matter did not uncover criminal conduct. Unmistakably, the subject matter of this indictment was the product of instigation by the government. It is manifestly not the province of law enforcement to create or instigate criminality. And, that is the heart of the first due process violation.

A second evil arising in this case is that the overriding goal of securing convictions resulted in an infirm investigatory methodology. The method of investigation employed in this case, in terms of collection of evidence, has made it impossible to reliably determine guilt in a criminal trial. The manner of the investigation, particularly selectively recording conversations and failure to record others, irretrievably renders unreliable any outcome and dismissal with prejudice is the only practical remedy.

ii

The Analysis Undertaken By The Second Circuit

The Second Circuit affirmed in toto the activities of law enforcement officials within the context of the ABSCAM investigation. The Court considered and denied petitioners' claims of relief on the basis of evidence of governmental creation of crimes; excessive inducements and coaching of congressmen.

a. Creation Of Crimes

With respect to the claim of creation of crimes, the Myers II Court found that the level of governmental involvement did not reach the "due process

limit of governmental participation in crime." 692 F.2d supra at 837. In the view of the Myers II Court, the ABSCAM sting operation "was the creation of an opportunity for the commission of crime by those willing to do so." 692 F.2d supra at 837. Contrary to the facts as adduced at the due process hearing, the Court characterized "the essential conduct of the agents and their paid informant [as] to see who showed up to take bribes and videotape them during so." 692 F.2d supra at 837.

b. Size Of Inducements

The Second Circuit made no cogent statement with respect to the issue as to the size of the inducments offered to Congressman Myers and petitioners Errichetti and Johanson. With respect to the Congressmen involved, the Myers II Court merely stated that the congressmen did not appear to be reluctant in the acceptance of money as a precondition to the sheik's decision to invest millions of dollars in projects within their districts. 692 F.2d supra at 838. With regard to the non-Congressmen petitioners, the Court did not utter any opinion as to propriety of inducments in multi-million dollar amounts. 692 F.2d supra at

837-838. In short, the Myers II Court did not provide any sound analytical opinion with respect to the size of inducements.

c. Coaching

The coaching issue was obscured by the Second Circuit in a statement that petitioners "seek to create a due process violation by combining an erroneous interpretation of the bribery statute with an unrealistic assessment of the facts." 692 F.2d supra at 840. As part of this analysis, the Second Circuit stated that the "playacting" defense, employed at trial with the acquiescence of the trial court, is not a defense to bribery. 692 F.2d supra at 840.[6] The Myers II Court then stated that the coaching "claim would only have merit if there were insufficient evidence of defendants' predisposition to playact or if the agents' conduct were so extreme as to exceed due process limits." 692 F.2d supra at 842. With regard to the due

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6 Whether or not playacting is a defense to bribery is not an issue herein. Assuming that playacting is not a defense the coaching aspect of the investigatory methodology becomes proof that the agents prodded the Congressmen into crimes by convincing them that the conduct was lawful.

process implications, the Court was speaking of the subjective test of entrapment as opposed to the so-called due process defense. In this context, the court stated that "promp t acquiescence shows a predisposition to accept a bribe, whether or not a promise of official action is intended to be kept." 692 F.2d supra at 842. With regard to any implication of the objective due process defense, the Court stated that the "bare suggestion to a Congressman that he take a bribe, even for a promise he need only pretend to make, surely does not violate a constitutional standard of outrageous behavior." 692 F.2d supra at 843.

d. Impairment of Accurate Fact-finding

In assessing the claim of impairment of accurate fact-finding, the court commenced its analysis with mention of a "well-established reluctance to dismiss criminal prosecutions because of faulty Government investigation." 692 F.2d supra at 843. Recognizing that petitioner urged efforts "to frame standards for undercover investigations," the Myers II Court nonetheless simplified its task by stating "[w]herever the [due process limits of fundamental fairness] might be, they have not been crossed in these

cases." 692 F.2d supra at 843. With specific respect to the employment and utilization of Weinberg the Court stated the "Due Process Clause does not forbid [his] employment, detail [his] supervision, nor specify [his] compensation." 692 F.2d supra at 846. The Myers II, in essence, was willing to tolerate without qualification future investigations of this type.

iii.

The Thrust Of ABSCAM Was The Manufacture Of Criminal Offenses

The Myers II Court was constrained to recognize that to be legitimate an undercover operation must be geared to identification of criminality as opposed to creation or manufacture of crime. This principle is purportedly recognized by the government. This distinction between improper instigation of crime and legitimate identification of criminal activity is the thrust of the first prong of defendants' due process claim. That ABSCAM had the earmarks of manufacture of crime was recognized and consistently emphasized by the prosecutors in the District of New Jersey. See United States v. Myers, 527 F.Supp. 1206 (E.D.N.Y. 1981).

A proper focus may have been assumed when the FBI initially decided to employ Melvin Weinberg but did not last very long as ABSCAM unfolded. With no predicate basis of probable cause or need, it was transformed into an elaborate, costly and sophisticated undercover "sting" operation designed to ensnare public officials who for a price would agree to do or pretend to do things which were illegal. The goal was to have the politicians accept money on camera with the promise that they would aid an imaginary sheik in an immigration problem.

Although courts have not yet specifically limited the approach of undercover agents to targets whom they have probable cause to believe are engaged in illegal activity, United States v. Catanzaro, 407 F.2d 998 (3rd Cir. 1969), some minimal level of suspicion should be a pre-requisite to the approach. See Tzimopaulous v. United States, 554 F.2d 1216, 1217-1218 (1 Cir. 1977). Otherwise, the operatives may find a level of susceptibility among a fairly large section of the community, and the police function, if given this full license, will tend to promote rather than prevent crime. See United States v. Bocra, 623 F.2d 281, 288-289 (3 Cir. 1980).

Numerous cases in the state and federal courts have now embraced either the objective theory of entrapment or the overreaching and overinvolvement due process defense. The leading case, decided in the Third Circuit is United States v. Twigg, supra. Twigg has retained its vitality despite the opinion of the Third Circuit in United States v. Jannotti, 673 F.2d 578 (3 Cir. 1982), an ABSCAM-related case in which the due process defense did not lead to reversal of the convictions. . The Jannotti Court nonetheless specifically upheld its recognition of the due process defense in Twigg. The Jannotti Court merely stated that the facts before it did not rise to the demonstrable level of outrageousness which it reviewed in Twigg. The Jannotti Court was also careful to note that its findings as to the lack of a due process violation in the case before it did not bear any relationship to whether the police conduct in ABSCAM may have violated the rights of other defendants. Simply put, the Jannotti court might well have found a due process violation in Myers.

In Twigg, a government informant, seeking to make cases, contacted an acquaintance of 20 years to discuss development of an amphetamine laboraory. The

target expressed interest and with the copious assistance of the informant and the DEA an operation was constructed. The operation did not previously exist and there was no reason to believe that it would have come into existence absent the active intervention of the government's informant and the government's provision of resources. Moreover, the informant's initial target recruited another individual, Twigg, to assist in the operation. Although the informant did not specifically generate this result, it occurred with the full knowledge of the informant's contacts at the DEA. Entrapment was tried to the jury by the informant's initial target but not by Twigg since Twigg was not brought into the operation by the government's agent. The jury found pre-disposition and convicted. The Third Circuit reversed in an exhaustive decision.

After reviewing this Court's decisions in Hampton and Russell, and a variety of circuit court decisions before and since, the majority held that a due process defense of over-reaching and overinvolvement was not barred by Hampton and Russell and indeed that a majority of the Supreme Court would clearly embrace such a defense in the appropriate case. The majority further found that the

absence of an on-going criminal activity which ws infiltrated and exposed condemned the prosecution. The majority found that "the conduct of the government agents...generated new crimes merely for the sake of pressing criminal charges." Twigg Id. at 381. Likewise, in the instant case there was no suggestion that Congressman Myers was engaged in any covert operation of accepting bribes nor, as was conceded by the district court, is there any suggestion that he was ever involved in anything criminal in the past.

The dissent in Twigg was of the view that the majority had improperly used the due process analysis to reestablish the objective approach to entrapment after its rejection by a majority in Hampton. It should be emphasized though that the dissent did not disagree with the majority's condemnation of the overreaching. Rather, the dissent assumed the position that the federal courts after Hampton lacked authority to create a police-conduct defense under the banner of due process for a pre-disposed individual. But the majority correctly met that argument by noting that

both Russell and Hampton involved infiltration into on-going criminal operations. See United States v. Briola, 660 F.2d 763, 764 (lo Cir. l98l).

And, to make the analogy between Twigg and the instant case complete, it must be noted that in Twigg the defendant brought in by the codefendant and not by the government's information was also immunized by due process from a valid conviction since the misconduct in creating the offense was so "demonstrably outrageous" that it barred a valid prosecution. The court noted in Twigg that it was puzzled why the Government was extending such leniency to its informant in exchange for the convictions of two men with no apparent criminal designs. See id. at 381 n.9.

The basic difference between infiltration of existing ongoing criminal operations and generation of criminal conduct also underpinned the Court's decision in Greene v. United States, 454 F.2d 783 (9 Cir. l97l), wherein the governmental effort was rebuked. In Green, a federal agent instigated the defendants to reinvolve themselves in the production of bootleg liquor subsequent to their release from prison. The agent participated in construction of a

still and offered to supply equiment and an operator. The agent also provided sugar, a key ingredient, at wholesale prices and was the only customer of the operation. The Green Court reversed the conviction, finding that the agent had sought out and preyed upon the defendants immediately upon their release from prison. Cf. People v. Isacceson, 878 N.E.2d 78 (Ct. App. 1978); United States v. Brown, 635 F.2d 1207, 1212-1214 (6 Cir. 1981); United States v. Gonzalez, 539 F.2d 1238, 1239-1240 (9 Cir. 1976).

Examples of ABSCAM's overreaching and overinvolvement abound in the record. The government obviously manufactured a crime which otherwise was not likely to have occurred. The investigation focused indiscriminately on Congress. With specific regard to Myers, he was approached by respected attorneys who were induced by Weinberg to generate introductions to Congressmen. Johanson and Criden approached Weinberg with a wholly legitimate transaction. Weinberg and Amoroso dangled huge amounts of money before them in terms of financing of the project. Amoroso and Weinberg, however, made introductions to public officials a condition precedent for financing. This scenario was the creative activity of the government.

Bribes as instigated by Weinberg and Amoroso were wholly outside the scope of Criden's and Johanson's purposes in contacting them.

Weinberg, the government's chief operative, immediately involved himself in criminal conduct. He provided stolen and forged certificates of deposit to Rosenberg and solicited gifts. Weinberg not only feigned double-dealing on his employers, he actually engaged in it and in such a way as to provide Errichetti instant ascension to millionaire status. Further, he performed his agent responsibilities, viz. recordings of conversations and erasures, in such a fashion as to further enhance the creation of crime.

Exorbitant gain was offered to all of the Myers defendants. Myers was promised $50,000 for a feigned performance. Johanson and Criden were offered the opportunity to divide between $3,500,000 to $5,000,000. Errichetti was offered interests in a real estate company whose initial venture would yield $3,000,000 with a 9% interest in a $50,000,000 profit, a titanium mine, a

condominium, a position as the sheik's highly paid personal representative as well as interests in casino-hotels in Atlantic City and finders fees on loans and other deals.

It is clear that there was no responsible perception that the ABSCAM scenario would prevent further crime since there was no evidence that any criminal activity was afoot. A wholly legitimate deal was proferred by petitioners Criden and Johanson. The response was creation of a bribery scenario by Weinberg and Amoroso which was unrelated to the legitimate deal.

iv.

The Manner Of Supervision Of The ABSCAM Investigation And The Means Of Generating Evidence Was So Deficient That It Acted To Suppress Compilation Of Exculpatory Evidence And Rendered Defendants Unable To Fairly Defend In Violation Of Due Process

The manner of supervision of Weinberg, who was essentially without guidance in his efforts to generte evidence of criminality, was impermissibly deficient since it resulted in the creation of an offense in which petitioners' complicity may not be reliably determined. Tapes were erased and destroyed, conversations were selectively recorded and Weinberg was permitted to manipulate

middlemen by conducting meetings with them without the knowledge of the government. In his meetings and conversations with middlemen, Weinberg created the playacting rationale which instigated Myers to participate. However, since those meetings and conversations were not recorded, an unfair swearing contest has resulted. The net effect was that Weinberg structured a criminal case by preserving inculpatory evidence and suppressing exculpatory evidence.

Contrary to the Second Circuit's analysis of **United States v. Payner**, 447 U.S. 727 (1980), we submit that courts have retained supervisory power over the administration of criminal justice. **Payner** establishes the proposition that the nature of a violation of a third party's Fourth Amendment rights does not require a judicially-fashioned remedy respecting a claim for relief by an individual other than the party whose rights were violated. The **Jannotti** Court too recognized that the focus must be upon the rights of the individual seeking to assert a claim for remedy. Where an individual's own rights have

been violated a court not only has the authority to fashion a supervisory remedy but also a responsibility to do so. That responsibility is now upon this court.

POINT II

CERTIORARI SHOULD BE GRANTED TO FACILITATE A DETERMINATION BY THIS COURT AS TO WHETHER THE INDICTMENT AND PROSECUTION OF CONGRESSMAN MYERS VIOLATED HIS IMMUNITY UNDER THE SPEECH OR DEBATE CLAUSE. AND, THIS COURT MUST ALSO DETERMINE WHETHER THE CRIMINAL INVESTIGATION OF A MEMBER OF CONGRESS AS PART OF THE EXECUTIVE'S STING OPERATION WITHOUT A PROBABLE CAUSE BASIS VIOLATED THE SEPARATION OF POWERS DOCTRINES.

Creation by the Executive of the ABSCAM proceedings was a novel, unprecedented assault by one branch of government upon another. The Executive intentionally sought to invade the independence of the

Legislative Branch of government. The scheme devised by the Executive Branch and directed against members of the Legislative Branch was instituted without any basis to believe that Congress as a whole or any particular Congressman was soliciting or accepting bribes. Succinctly stated, it is conceded by all that the bribe offer made to petitioner Myers was not underpinned by a predicate finding that Myers was in any way predisposed to commit the crime of bribery.7 The factual predicate upon which the Government made its decision to attempt to solicit Myers and the other ABSCAM Congressmen were the representations of middlemen, most notably the Government's informant Mel Weinberg.

These facts completely distinguish the ABSCAM prosecution against Myers and related Congressmen from all previous executive branch prosecutions of Congressmen in that all such prior prosecutions involved either ongoing

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7 It should also be noted that it is our view that playacting remains a viable defense to bribery. Thus, we hold the opinion that petitioner did not accept a bribe. The government, prior to offering the money and staging the performance convinced petitioner Myers that he would not commit a criminal act by accepting the money.

criminal activity involving a Congressman or a prosecution where the executive branch had valid probable cause to commence an investigation targeted against a specific Congressman. See Sorrells v. United Sttes, 287 U.S. 435, 441 (1932); United States v. Russell, 411 U.S. 423, 426 (1973). The government in this case manufactured a fictitious crime and lured otherwise honest congressmen into it.

The validity of the instant prosecution depends upon this Court's acceptance of the proposition that the executive branch can without probable cause entice Congressmen into a fictitious form of criminality. This precise danger was perceived by this Court in its opinion in United States v. Helstoski, 442 U.S. 477 (1979). In discussing the policy reasons behind the speech and debate clause, the Helstoski Court stated:

> [I]t is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits...but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary.

> There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause...
>
> We reaffirmed that principle in Gravel v. United States...when we noted that the 'fundamental purpose' of the Clause was to free 'the legislator' from executive and judicial oversight that realistically threatens to control his conduct as a legislator.

If the executive branch through its politically appointed prosecutors is given the power and discretion to test selected Congressmen without sufficient probable cause, the potential for abuse is manifest. It was not so long ago in our country's history that great concern was expressed over an enemy's list utilized by the then Attorney

General of the United States at the instance of the President of the United States. The concern as expressed was the potential and actual abuse represented by such a list of persons who perforce became targets of investigation and/or prosecution.

Contrary to the suggestion of the Myers I Court the danger of a politically motivated prosecution is not overcome by the opportunity for a potential Congressional target to clear himself by saying no as such a conclusion does not express repugnance at the ill-founded investigation itself. It is the attempt to intimidate and not the conclusion of the bribe solicitation, be it successful or unsuccessful, which violates the separation of powers doctrine. At the very least, the prospect of an abusive executive investigation will inhibit Congressmen who are not predisposed to commit crimes or to corrupt their office in their conversations with third parties.

In Myers I the Second Circuit concluded that the essence of the argument made herein involves choices of public policy rather than constitutional imperatives. This Court has not limited the argument in that fashion. What is clear is that the issues raised herein are fundmental to the

structure of government. In United States v. Brewster, 408 U.S. 59 (1972), and United States v. Johnson, 383 U.S. 169 (1966), this Court expressed great concern and indeed division concerning the scope of the separation of powers doctrine. The issues raised herein are far from settled.

ABSCAM involves an executive branch prosecution technique which is unprecedented in the history of this county. The circuit court's opinion in the instant case and its companion cases represent a constitutional blank check to the executive branch to engage in future-like activity. It is appropriate that this court review ab initio the constitutional concerns raised herein so that all branches of government may understand their position vis-a-vis one another. Even if this court should conclude that the separation of powers doctrine were not violated by the instant prosecution tactics, such a declaration by this Court would obviate the confusion which will surround future interpretations of Myers I and Jannotti.

The solution does not lie in awaiting congressional response in the form of legislation or of future Justice Department regulations. Neither response would be of constitutional dimension. It is this Court which since

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803), has reserved to itself the final word concerning the resolution of constitutional dilemmas. Accordingly, it is no answer to say that ABSCAM-type abuses may be corrected by non-judicial actions to the extent that such abuses impinge upon constitutional doctrine.

Acceptance of a rule of probable cause as a prerequisite for directing a sting operation against the Congress or the Judiciary would sacrifice very little in terms of protecting the public from corrupt legislators or judges. Where the Executive had reason to believe particular legislators or judges were engaged in corrupt activity it would be empowered to proceed with whatever law enforcement tools were appropriate. It simply could not without such a basis undertake to test randomly or otherwise members of the other branches to see whether they were corruptible. In petitioners' view this would be a desirable limitation on all sting operations. Tricks, deceit and guile as well as a highly paid informant were employed to test the Congress. If ABSCAM is to teach us anything about our institutions it would be preferable to conclude

that the checks and balances system needs some reinforcement rather than that one branch is steeped in potential for corruption.

POINT III

THIS COURT SHOULD GRANT CERTIORARI TO ISSUE A RULE AS TO THE ADMISSIBILITY INTO EVIDENCE OF PROOF OF CRIMINAL INTENT ACTS WHICH OCCUR SUBSEQUENT TO TERMINATION OF THE CONSPIRACY AND SUBSTANTIVE OFFENSES CHARGED IN THE INDICTMENT.

FedR.Evid.404(b) now governs the admission of evidence of other crimes, wrongs or acts in a federal criminal trial. The rule states inter alia:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as...intent...plan, knowledge...

The rule on its face would appear to clearly set forth the limited purposes for which "other crimes, wrongs or acts" evidence may be admitted. Courts, however, repeatedly over-extend the state of mind exception, finding that nearly any past criminal act or wrong is relevant to state of mind. Ordinarily, the sole grounds upon which such evidence is excluded is that the offense or act is not sufficiently similar nor close enough in time to be relevant. United States v. Fierson, 419 F.2d 1020, 1022 (7 Cir. 1969). See McCormick, Evidence Sec. 157, at 327, n.2 (1954); Wigmore, Evidence Sec. 302 (3d Ed. 1940) (cases admitting prior criminal acts as evidencing intent); Weinstein and Berger, Weinstein's Evidence Vol. 2, Sec. 404 [08] at 404-45.

The area of challenge in this case is with respect to whether subsequent acts which transpired in January of 1980 can be fairly characterized as being probative of intent on August 22, 1979. Several circuits have adopted an interpretation of Fed.R.Evid.404(b) which permits admission in certain contexts of subsequent acts of a defendant as proof of his intent at an earlier time. See, United States v. Bermudez, 526 F.2d 89, 95 (2 Cir. 1975); United States v. Mack, 643 F.2d 1119, 1121-1122 (5 Cir. 1981);

United States v. Childs, 598 F.2d 169, 173 (D.C. Cir. 1979); Pacelli v. United States, 588 F.2d 167, 173 (D.C. Cir. 1979); United States v. King, 587 F.2d 956, 962 (9 Cir. 1978); United Sttes v. Gallo, 543 F.2d 361, 364 (D.C. Cir. 1976). The analytical underpinning of the cases in which admission of "subsequent other crimes" evidence has been affirmed is faulty.

With respect to the clear untrustworthiness of admission of subsequent act evidence, United States v. Boyd, 595 F.2d 120 (3 Cir. 1978), is particularly instructive. In that case, the Third Circuit flatly rejected an interpretation of Fed.R.Evid.404(b) which admits subsequent other crimes evidence. In Boyd, the trial court admitted testimony of an undercover officer that on three days after expiration of the conspiracy charged in the indictment, which concerned the manufacture and distributin of methamphetamine, he discussed with one defendant a purchase of drugs and tht more than two months after the conspriracy he met with another defendant for a similar purpose. In finding reversible error, the Boyd Court stated:

> ...The logic of showing prior intent or knowledge by proof of subsequent activity escapes us. Nor

> do we understand how, logically, a post-conspiracy purchase of a chemical ingredient tends to prove modus operandi of the prior manufacturing operation. [595 F.2d at 126]

In regard to the ineffectiveness of a limiting instruction, as to the rights of codefendants, the Boyd Court stated:

> The trial court gave an instruction limiting the use of [the] testimony to Parr and Lipton, and to the specific purpose of proving that they were members of the conspiracy. Once Parr and Lipton were connected to the conspiracy, however, their out-of-court statements could be considered by the jury against codefendants. Thus, the court's admonitory instruction was, we believe, wholly ineffective in insulating the codefendants in from the prejudicial effects of Goff's testimony. [595 F.2d at 127].

We believe that Boyd is representative of the most cogent position respecting the relevance of subsequent act evidence. Cf. United States v. Jimenez, 613 F.2d 1573,

1376 (5 Cir. 1980) ; United States v. Powell, 587 F.2d 443, 449 (9 Cir. 1978). Accordingly, we urge this Court to adopt the position of the Third Circuit in United States v. Boyd, supra, and reject as constitutionally infirm the interpretation of Fed.R.Evid.404(b) which permits admission of evidence of subsequent criminal acts as proof of intent on an earlier occasion. The inappropriate use of subsequent act evidence in this case is illustrative of the need for a strict rule. An analysis of the eivdence indicates that it was not demonstrated to be relevant as to any issue in dispute. The particular acts were wholly non-probative as to Sec.201 intent on August 22, 1979. The January meetings were merely evidence of a new plan to fleece the Sheik.

Petitioner Myers was the only defendant to testify at trial. In essence, the defense which he presented was that he was playacting and did not accept the money in return for being influenced in his official acts. The jury was instructed that a finding of playacting warranted acquittal. Myers was recruited by the other defendants to merely meet with the Sheik. Prior to the meeting, he was coached by Errichetti to come on strong. There was no clear evidence to the contrary. The government basically

relied on the testimony of Weinberg and Amoroso and the videotape. Weinberg and Amoroso testified that it was made clear to Errichetti that the [fictitious] Sheik would have an expectation of favor subsequent to payment of the money. (T1064S-5 to 14; T1675-3 to 5). However, there were no tapes or other evidence supporting this proposition. Contrarily, Ellis Cook, an immunized witness of the government, who was also an unindicted co-conspirator, testified that the understanding of the group was tht the Congressman would not be required "to do something [in return]." (T1138-5). Viewed in this light, it is clear that the government was hard-pressed on the basis of the evidence which it generated to prove Sec. 201 intent. Its exclusive means of proof was the videotaped performance which by itself was proof of an actus reus but standing alone was hardly convincing proof of a Sec. 201 mens rea in light of the Congressman's playacting defense which was accepted by the trial court. Therefore, the tape at trial merely resulted in the jury having to determine whether a duly-elected Congressman was truthful in stating that on August 22, 1979 he was playacting. While the Congressman could not retain

his honor in view of the tape, he could nonetheless place his credibility before the jury with respect to the narrow issue of Sec. 201 intent.

This dilemma stemmed from the government's ABSCAM modus operandi. The government did not contemplate as part of its investigation that the Congressman would be approached and actually requested to exert some influence. (T1046-5 to 8). The Congressman's response to such an approach, absent tapes concerning what he was told by middlemen, would be the only reliable evidene of intent.

Resolution of the dilemma by the trial court and the government was in the form of admission of evidence of the subsequent acts. Petitioner Myers did not contest that he participated in a plan to fleece the Sheik. He, as all the other defendants, did contest the issue as to a Sec. 201 intent on August 22, 1979. The subsequent acts did not to any degree elucidate the issue of a Sec. 201 intent on an earlier occasion. Those acts at best merely cumulatively demonstrated the plan to take money. The result of their admission, under circumstances where they bore no relevancy respecting the issue of Sec. 201 intent on

August 22, 1979 was to indicate to the jury tht petitioner Myers and Criden had criminal dispositions.And, since petitioners Johanson and Errichetti were involved with them, they too must have such a disposition.

Admission of the wholly irrelevant subsequent act evidence in this case resulted in the jury hearing from the mouth of a United States Congressman statements concerning corruption in all areas of the City of Philadelhia, including the Mayor and City Council and Atlantic City. Those acts also incorported references to the Mafia and improprieties in Washington and throughout the fabric of government. There is no basis upon which it may be argued tht improper admission of such evidence may under any circumstances be deemed harmless. Indeed, the sheer number of the areas of corruption which were referred to would in itself overwhelm a jury. United States v. Krezdorn, 639 F.2d 1327, 1331 (5 Cir. 1981). In short, the evidence merely tended to demonstrate a propensity toward crime and to shock the jury's conscience.

We submit that the erroneously admitted evidence was of such a character tht it precluded fair consideration of petitioners' cases by the jury. Even

assuming that subsequent act evidence is admissible under certain circumstances, the subsequent acts in this case were clearly more prejudicial than probative. Indeed, they were fatally prejudicial.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant this petition for certiorari.

Respectfully submitted,

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ON THE PETITION

DATED: January 14, 1983

No. 82-1255

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In The

Supreme Court of the United States

OCTOBER TERM, 1982

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ANGELO J. ERRICHETTI,
LOUIS JOHANSON,
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-vs-

THE UNITED STATES OF AMERICA.

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APPENDIX A

UNITED STATES v. MYERS
Cite as 692 F.2d 823(1982)

UNITED STATES of America, Appellee,
v.
Michael O. MYERS, Angelo J. Errichetti, Louis Johanson, and Howard L. Criden, Defendants-Appellants.

UNITED STATES of America, Appellee,
v.
Frank THOMPSON, Jr., and John M. Murphy, Defendants-Appellants.

UNITED STATES of America, Appellee,
v.
Raymond F. LEDERER, Defendant-Appellant.

Nos. 904 to 905, 906, 907, 840, 841 and 855, Dockets 81-1342 to 81-1347 and 81-1446.

United States Court of Appeals, Second Circuit.

Argued April 5, 1982

Decided Sept. 3, 1982

Rehearing Denied in No. 81-1345 Nov. 17, 1982.

Defendants appealed from their convictions in the United States District Court for the Eastern District of New York, George C. Pratt, J., in Abscam prosecution. The Court of Appeals,

APPENDIX A

Newman, Circuit Judge, held that: (1) Government's involvement in Abscam operation was not so excessive as to violate due process; (2) any ambiguity arising from the manner in which bribes were offered in Abscam operation was due to observance of ground rules set by defendant congressmen and did not violate due process; (3) it was no defense that defendant congressman's corrupt promise could not have been carried out due to the fictitious nature of the persons alleged to be seeking assistance; and (4) defendant congressman could not be convicted of violation of statute prohibiting members of Congress from receiving compensation for services rendered in relation to any proceeding in which the United States is interested merely by accepting money for giving advice about immigration.

Affirmed in part and reversed and remanded in part.

See also D.C., 527 F. Supp. 1206.

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1. Criminal Law 37(3)

Entrapment defense exonerates a defendant who engages in criminal behavior when the activity of government agents implants in the mind of an innocent person the disposition to commit the alleged offense and induces its commission; but the defense of entrapment is not established simply because government agents afford opportunities or facilities for the commission of the offense.

2. Criminal Law 772(6)

When an entrapment defense is raised by evidence of inducement, either through cross-examination or affirmative evidence, a defendant is entitled to have a court assess whether the record contains sufficient evidence from which a reasonable jury can conclude beyond a reasonable doubt that the prosecution has proved the defendant's predisposition to commit the offense.

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3. Criminal Law 1030(3)

Defendant who fails to assert entrapment as a factual defense at his trial cannot assert it as a legal defense to his conviction.

4. Criminal Law 569

Evidence in Abscam prosecution entitled jury to find defendant congressman's predisposition to accept a bribe beyond a reasonable doubt. 18 U.S.C.A. § 201.

5. Constitutional Law 257.5

Government's involvement in abscam operation was not so excessive as to violate due process. U.S.C.A. Const. Amend. 5; 18 U.S.C.A. § 201.

6. Criminal Law 1158(2)

District court's finding at due process hearing in abscam prosecution that defendant congressmen were not "playacting" when they accepted bribes was not clearly erroneous. 18 U.S.C.A. § 201; U.S.C.A. Const. Amend. 5.

APPENDIX A

7. Bribery 3

Lack of intent to keep promise made for a bribe is not a defense to a charge of corrupt receipt of money by a public official. 18 U.S.C.A. § 201.

8. Criminal Law 37(4)

Prompt acquiescence shows predisposition to accept a bribe and precludes an entrapment defense, regardless of whether the promise of official acts is intended to be kept. 18 U.S.C.A. § 201.

9. Constitutional Law 257.5

Government agents' coaching of congressman during Abscam operation, assuming such coaching occurred, was not so outrageously coercive as to violate due process. 18 U.S.C.A. § 201; U.S.C.A. Const. Amend. 5.

10. Constitutional Law 257.5

Any ambiguity arising from the manner in which bribes were offered to congressmen in Abscam operation was due to observance of ground

rules set by the congressmen, and did not violate due process. 18 U.S.C.A. § 201; U.S.C.A. Const. Amend. 5.

11. Criminal Law 700

Justice Department's failure to comply with its internal guidelines in conducting Abscam operation did not invalidate the operation.

12. Criminal Law 700

Conduct of Abscam operation did not deny any defendant a constitutionally protected right.

13. Bribery 11

In Abscam prosecution, evidence was sufficient to establish that codefendants knew the purpose for which money was being paid to congressman. 18 U.S.C.A. §201.

14. Criminal Law 422(1)

In Abscam prosecution, district court properly admitted into evidence conversations that defendant congressman and codefendants had with undercover agents, as such conversations illuminated the nature of the conspiracy and occurred

while the conspiracy was still in existence. 18 U.S.C.A.§201.

15. Criminal Law 734

District court properly decided defendants' due process claims in Abscam prosecution, without submitting them to the jury. U.S.C.A. Const. Amend. 5; 18 U.S.C.A. §201.

16. Criminal Law 786(2)

In Abscam prosecution, district court properly instructed jury that they could consider witness' prior to "failure to disclose information, when the opportunity to do so presented itself," despite contention that the jury could have taken the instruction as permission to draw an adverse inference from defendant congressman's silence during the course of an interview with agents of the Federal Bureau of Investigation. 18 U.S.C.A. § 201.

17. Criminal Law 805(3)

In jury charge in Abscam prosecution, district court properly referred to the conman, who

was used by the Government to set up the Abscam operation, as an "informer." 18 U.S.C.A. §201.

18. Criminal Law 1173.2(5)

In Abscam prosecution, no prejudicial error, if error at all, arose from district court's omission of requested instructions that the jury could infer that tapes and unrecorded portions of tapes not produced by the Government would be unfavorable to the prosecution.

19. United States 12

Although speech or debate clause, in covering "legislative acts," extends beyond words spoken during legislative debate, any other matters it reaches must be an integral part of the deliberative and communicative processes by which members of Congress participate in committee and House of Representatives proceedings. U.S. C.A. Const. Art. 1, §6.

20. United States 12

In Abscam prosecution, admission of defendant congressman's annual financial statement,

filed with the clerk of the House of Representatives pursuant to the Ethics in Government Act of 1978, in which the congressman falsely listed his share of bribe as a "consulting fee," did not violate the speech or debate clause. U.S.C.A. Const. Art. 1, § 6; Ethics in Government Act of 1978, § 101 et seq., 2 U.S.C.A. § 701 et seq.

21. Criminal Law 772(6)

District court properly explained "predisposition" for entrapment purposes by asking jury to determine whether defendant was "ready and willing" to commit the crimes charged whenever a favorable opportunity arose.

22. Criminal Law 787(2)

In the course of explaining that defendant had no obligation to present any evidence, district court properly told the jury that defendant had the power to subpoena witnesses.

23. Criminal Law 31

In Abscam prosecution, it was no defense that defendant congressman's corrupt promise

could not have been carried out due to the fictitious nature of the persons alleged to be seeking assistance. 18 U.S.C.A. §201(c)

24. Criminal Law 863(2)

In Abscam prosecution, district court's supplemental instruction, which permitted jury to find that defendant congressman constructively received bribe money, was proper. 18 U.S.C.A. §201(c)

25. Criminal Law 1039

Issue whether district court's supplemental instruction failed to adequately explain concept of constructive possession was waived on appeal, where opportunity for amplification of the instruction was available to defendants both before and after the instruction was given.

26. United States 52

Statute prohibiting members of Congress and federal employees from receiving compensation for services rendered in relation to any proceeding in which the United States is interested

reaches only services performed or to be performed before the federal forums listed in the statute. 18 U.S.C.A. § 203(a).

27. United States 52

Congressman could not be convicted of violation of statute prohibiting members of Congress from receiving compensation for services rendered in relation to any proceeding in which the United States is interested merely by accepting money for giving advice about immigration. 18 U.S.C.A. § 203(a).

28. Bribery 11

There was sufficient evidence that defendant congressman received money and that he agreed to take official action in exchange for such money to sustain his conviction in Abscam prosecution. 18 U.S.C.A. § 201.

29. Bribery 11

There was sufficient evidence that defendant congressman received money for his benefit in exchange for his promise to take official

action to sustain his conviction in Abscam prosecution, even though there was no evidence that he actually took physical possession of the money. 18 U.S.C.A. §201.

30. Constitutional Law 77, 82(7)

Searches and Seizures 7(10)

Videotaping of congressman's conversations with undercover agents involved in Abscam operation did not violate the congressman's rights under the First and Fourth Amendments and the doctrine of separation of powers, since the conversations were not privileged and contained evidence of criminal violations. 18 U.S.C.A. §201; U.S.C.A. Const. Amends. 1,4.

31. United States 12

In Abscam prosecution, speech or debate clause did not bar introduction into evidence of defendant congressman's private conversations with a second congressman on the floor of the House of Representatives, in which he invited the second congressman to join the ranks of those

accepting bribes. U.S.C.A. Const. Art. 1, §6; 18 U.S.C.A. §201.

32. United States 12

Speech or debate clause accords immunity to what is said on the floor of the House of Representatives in the course of the legislative process, not to whispered solicitations to commit a crime. U.S.C.A. Const. Art. 1, §6.

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APPENDIX A

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Before LUMBARD, FRIENDLY and NEWMAN, Circuit Judges.

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NEWMAN, Circuit Judge:

In **United States v. Myers**, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956, 101 S. Ct. 364, 66 L.Ed.2d 221 (1980) (**Myers I**), we ruled that the Government had not violated the defendant's constitutional rights as a Member of Congress by requiring him to stand trial on charges of bribery arising out of an undercover "sting" operation now well known to the nation as Abscam. **See also United States v. Murphy**, 642 F.2d 699 (2d Cir. 1980). The **Myers** ruling, made in advance of trial, was based on the face of the indictment that had been returned. Now before us are appeals from judgments of conviction entered in the Eastern District of New York (George C. Pratt, Judge), after three separate jury trials in which four Congressmen and three co-defendants were found guilty of various offenses related to corruption of public office arising out of the Abscam investigation. Nos. 81-1342, 81-1343, 81-1344, and 81-1446 are appeals from convictions in

the joint trial of appellants Michael O. Myers, formerly Congressman from the First District of Pennsylvania; Angelo J. Errichetti, formerly Mayor of Camden, New Jersey; Louis Johanson, formerly a member of the City Council in Philadelphia, Pennsylvania; and Howard L. Criden, a law partner of Johanson's. No. 81-1347 is an appeal from the conviction of appellant, Raymond F. Lederer, formerly Congressman from the Third District of Pennsylvania, at a separate trial. Nos. 81-1345 and 81-1346 are appeals from the convictions of Frank Thompson, Jr., formerly Congressman from the Fourth District of New Jersey, and John M. Murphy, formerly Congressman from the Seventeenth District of New York, at a joint trial. Though some of the three trials present distinct issues, all seven appellants raise questions of such similarity that we have found it appropriate to consider all of the claims in one opinion. For the reasons that follow, we have concluded that all of the judgments should be

affirmed on all counts, with the exception of Count Three of the indictment against Murphy, as to which we reverse and remand for a new trial.

I.

Myers, Errichetti, Johanson, and Criden were charged in a three-count indictment. Count One alleged a conspiracy in violation of 18 U.S.C. § 371 (1976) to defraud the United States and to violate 18 U.S.C. § 201, punishing bribery and the receipt of bribes by public officials including Members of Congress. This count alleged that the conspiracy sought to defraud the United States of the Government's right (a) to the honest service of Congressman Myers "in relation to matters before the House of Representatives performed free from corruption"; (b) to have the "official action" of Congressman Myers "in attempting to influence decisions of departments and agencies of the United States in relation of matters of immigration and residence performed free from corruption"; (c) to have the immigration laws "administered honestly

and impartially, free from improper and undue pressure and influence"; and (d) to have officials enforcing the immigration laws "perform their official duties free from impairment and obstruction by the exercise upon them of corrupt...pressure and influence." The conspiracy to violate section 201 was alleged to consist of the defendants' agreeing to demand and receive money for Congressman Myers in return for the Congressman's "being influenced in his performance of official acts."

Count Two alleged bribery in violation of 18 U.S.C. §201(c) and §2. This count alleged that Congressman Myers, aided and abetted by the other co-defendants, agreed to receive and received money "in return for" his "being influenced in his performance of official acts as a member of Congress, to wit, his decisions and actions in a matter involving immigration, residency and citizenship of foreign nationals which might at any time be pending or which might by law be brought before

the House of Representatives and departments" of the Government. Count Three alleged that all four defendants traveled in interstate commerce to carry on the unlawful activity of bribery, in violation of 18 U.S.C. §1952 and § 2.

The charges stemmed from an elaborate undercover "sting" operation conducted by the Federal Bureau of Investigation. Three FBI agents and a private citizen, all acting in an undercover capacity, purported to be representatives of two Middle Eastern sheiks operating a fictitious entity known as Abdul Enterprises, Ltd. The undercover operatives let it be known that their principals were interested in investing money in the United States and immigrating to this country. The core allegation against Myers and his co-defendants was that on August 22, 1979, Myers received $50,000 in return for his promise to introduce private immigration bills permitting the sheiks to remain in the United States and to take other necessary action includ-

ing intervention with the State Department. A jury trial was begun on August 11, 1980, and concluded on August 29, 1980. The jury convicted all four defendants on all three counts. Errichetti and Criden were each sentenced to concurrent terms of six years' imprisonment and fines totalling $40,000. Myers and Johanson were each sentenced to concurrent terms of three years' imprisonment and fines totalling $20,00

In a separate indictment, Lederer was charged, along with Errichetti, Johanson, and Criden, in a four-count indictment. Three of the counts paralleled the conspiracy, bribery,and interstate travel counts of the Myers' indictment. In addition, a fourth count alleged receipt of an unlawful gratuity by Lederer, in violation of 18 U.S.C. §201(g). This count alleged that Lederer, aided and abetted by his co-defendants, agreed to receive and received money "for and because of" the performance of his official duties in a matter involving immigration of foreign nationals.

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The core allegation in this indictment was that on September 11, 1979, Lederer received $50,000 in return for his promise to help the sheiks with their immigration problems. Lederer's co-defendants were severed from his case after their convictions in the **Myers** case. Lederer's trial began January 5, 1981, and concluded January 9, 1981. The jury convicted Lederer on all four counts. He was sentenced to concurrent terms of the years' imprisonment and fines totalling $20,000.

In a third indictment, Thompson and Murphy were charged, along with Criden and Joseph Silvestri, a New Jersey businessman, in a five-count indictment. Counts One, Two, and Four paralleled the conspiracy, bribery, and interstate travel counts of the Myers' indictment. Count Three charged a so-called conflict of interest, in violation of 18 U.S.C. §203(a). This count alleged that Thompson and Murphy, aided and abetted by Criden, agreed to receive and received

money "as compensation for services rendered before departments, agencies and officers of the executive branch of the Government" in a matter involving immigration of foreign nationals. Count Five, paralleling a count of the Lederer indictment, charged receipt of an unlawful gratuity, in violation of 18 U.S.C. § 201(g). The core allegation in this indictment was that on October 20, 1979, Murphy received $50,000, subsequently shared with Thompson, in return for their promises to help the sheiks with their immigration problems. The charges against Criden and Silvestri were severed by agreement from the charges against Thompson and Murphy. Trial (the second in the sequence of three) began on November 10, 1980, and concluded on December 3, 1980. Before the case went to the jury, Judge Pratt dismissed, as against Thompson, Count Four charging unlawful interstate travel. The jury found Thompson guilty on Counts One, Two, and Five charging conspiracy, bribery, and receipt of an

unlawful gratuity; he was found not guilty on Count Three charging conflict of interest. Murphy was found guilty on Counts One, Three, and Five charging conspiracy, conflict of interest, and receipt of an unlawful gratuity; he was found not guilty on Count Two charging bribery. The jury reached no verdict on Count Four, as against Murphy, having been instructed not to consider this count unless they convicted Murphy on Count Two. Judge Pratt subsequently dismissed Count Four as against Murphy. Thompson was tentatively sentenced to the maximum allowable terms, pursuant to 18 U.S.C. § 4205(c), pending further consideration of his medical condition.[1] Murphy was sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000.

---

1. Imposition of a tentative sentence pursuant to 18 U.S.C. §4205(c) (1976) does not alter the finality of the judgment of conviction for purposes of our appellate jurisdiction. **Corey v. United States, 375 U.S. 169, 174-76, 84 S. Ct. 298, 302-303, 11 L.Ed.2d 229 (1963) (constructing predecessor statute).**

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In the interim between the conclusion of the three trials and the sentencing of all appellants, Judge Pratt conducted a consolidated hearing to consider various claims by all seven appellants that the Government's conduct in the Abscam investigation and in the prosecution of the charges at trial violated rights protected by the Due Process Clause of the Fifth Amendment. In considering these allegations, Judge Pratt took testimony during a 16-day "due process" hearing conducted in January and February, 1981. Judge Pratt also permitted the seven appellants to rely upon evidence pertinent to their due process claims that had been presented in other proceedings stemming from the Abscam investigation. These included the record of the trial and the "due process" hearing concerning charges against former United States Senator Harrison A. Williams, Jr., of New Jersey, in the Eastern District of New York, and the trial and "due process hearing records of charges against former Philadelphia

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Councilmen Harry P. Jannotti and George X. Schwartz in the Eastern District of Pennsylvania (John P. Fullam, Judge),[2] against former Congressman John W. Jenrette and a co-defendant in the District of Columbia (John G. Penn, Judge), and against former Congressman Richard Kelly and two co-defendants in the District of Columbia (William B. Bryant, Judge).[3] Based upon this comprehensive record, Judge Pratt, in a detailed and thoughtful opinion, denied the due process contentions of the seven appellants as well as their multitude of other claims attacking the validity of their convictions. **United States v. Myers, 527 F.Supp. 1206 (E.D.N.Y. 1981).**

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2. Judge Fullam set aside the jury verdicts that had been returned against Jannotti and Schwartz, **United States v. Jannotti, 501 F.Supp. 1182 (E.D. Pa. 1980),** but on appeal the Third Circuit reinstated the verdicts, **United States v. Jannotti, 673 F.2d 578 (3d Cir. 1982) (en banc), cert. denied, ___ U.S.____, 102 S. Ct. 2906, 73 L.Ed.2d 1315 (1982).**

3. Judge Bryant set aside the jury verdict that had been returned against Kelly and his co-defendants and ordered a new trial for the co-defendants. **United States v. Kelly, 539 F.Supp.**

(footnote cont'd)

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II.

The background of the Abscam operation is described by Judge Pratt as follows:

" 'Abscam' is the code word given by the Federal Bureau of Investigation to an undercover 'sting' operation conducted out of the FBI office at Hauppauge, Long Island, New York, under the supervision of agent John Good. Abscam began after Melvin Weinberg in 1977 was convicted in the Western District of Pennsylvania on his plea of guilty to fraud. In return for a sentence of probation Weinberg agreed to cooperate with the FBI in setting up an undercover operation similar to the London Investors, Ltd. 'business' that Weinberg had used with remarkable success before his arrest and conviction in Pittsburgh."

"For most of his life Weinberg had been a 'con man' operating in the gray area between legitimate enterprise and crude criminality. For

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(footnote cont'd)

363 (D.D.C. 1982), appeal docketed, No. 82-1660 (D.C. Cir. June 15, 1982).

a number of years in the 1960s and early 1970s, he had been listed as an informant by the FBI and had provided his contact agent from time to time with intelligence about various known and suspected criminals and criminal activities in the New York metropolitan area and elsewhere, for which he had received in return occasional small payments of money. When he was arrested on the charge that led to his guilty plea, his informant status was cancelled, later to be reinstated after his guilty plea and agreement to cooperate with the FBI."

"As agent-in-charge of the FBI's Long Island office Good was, at all times, the supervising agent for Abscam. Initially, Weinberg worked directly under special agent John McCarthy who later was replaced by special agent Anthony Amoroso. Both McCarthy and Amoroso worked undercover with Weinberg."

"The general pattern of the 'scam' or 'sting' operation reflected Weinberg's earlier theme of representing wealthy Arab interest who

had large sums of cash available for business opportunities in this country. When operating outside the law in Huntington, Long Island as London Investors, Weinberg's method had been a 'front-end scam' for real estate investment wherein he would promise to obtain large loans for his victims and pick-up 'appraisal' or 'processing' fees of several thousand dollars, but without ever producing the final loans."

"Although not identical to London Investors, the initial plan developed by Weinberg and the FBI was similar. Weinberg was to present himself as a business agent for 'Abdul Enterprises', an organization backed by two extremely wealthy Arab sheiks looking for American outlets for their cash. He would pass the word of big money available for deals to other con men and people who move between the legitimate and illegitimate. If criminal proposals appeared, appropriate action would be taken by the FBI."

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"Weinberg and the agents set up business in an office in Holbrook, Long Island. The FBI's code name 'Abscam' came from the first two letters of 'Abdul', combined with the word 'scam'."

"At first Abscam's focus was upon stolen and forged securities and stolen art work. Other 'investment' opportunities soon presented themselves, and quickly the investigation turned itself toward Atlantic City and the gambling casinos which were then being proposed and constructed. As word spread about Weinberg's contact with virtually inexhaustible Arab funds, Angelo Errichetti, who was both mayor of Camden, New Jersey, and a New Jersey state senator, came on the scene. Errichetti claimed to have extraordinary influence in obtaining gambling casino licenses, power over the commissioners who issued the licenses, connections with organized crime, ability to deal in narcotics, guns and counterfeit securities, as well as intimate knowledge of which

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members of the New Jersey Legislature could be bought."

"Errichetti brought to the undercover agents Howard Criden, a Philadelphia lawyer seeking to promote a gambling casino in Atlantic City. In July of 1979, Errichetti and Criden met with Weinberg and Amoroso on the sheiks' yacht in Florida to discuss financing for the proposed casino that a client of Criden's wanted to build. In the course of the day Amoroso and Errichetti discussed the problem that might be faced by the sheiks should a revolution occur in their country and should they want to come to the United States as permanent residents. Amoroso told Errichetti that he thought cooperation of public officials would be needed and that money would be no problem.

Immediately after this conversation Errichetti and Criden formed an alliance in which they undertook to produce for Amoroso and Weinberg public officials who, in return for money, were willing to use their influence with the

government on the sheiks' behalf. Meetings were arranged at various locations in New York, Philadelphia and Washington where the FBI monitored the proceedings with concealed videotape cameras and microphones. Where videotapes was not feasible, audio recordings were used."

527 F.Supp. at 1209-10.

Once the focus of Abscam shifted to the "asylum scenario," [4] as the parties at the trials characterized the plan to have Abdul Enterprises

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4. There is room for dispute as to who originated what came to be called the "asylum scenario," the willingness of Abdul Enterprises to pay money to public officials in return for help with future immigration problems that the sheiks might encounter. Weinberg testified before Judge Fullam that the idea first occurred to him while on the yacht on July 26, 1979, as a result of a suggestion of Criden. Agent Amoroso testified before Judge Fullam and Judge Pratt that he thought of the idea the previous day as a result of a newspaper article about the immigration problems of former Nicaraguan President Anastasio Somoza. The Government argued to Judge Bryant that the idea was originated by Errichetti, Criden, and Myers. At least a general reference to the idea was broached by Weinberg to George Katz, a defendant in another Abscam case, in a recorded telephone conversation held on July 14, 1979.

offer cash to public officials in return for help on immigration matters, events rapidly unfolded, leading to the incidents on which the charges against the seven appellants were based. After returning to Philadelphia from the cruise on the yacht, Criden told his law partners, Johanson and Ellis Cook, that Errichetti had told him they could make substantial sums of money if they knew any Congressmen who would be willing to meet the sheik or his representatives. Cook testified for the Government under a grant of immunity. Criden reported that the money, $100,000, would be paid directly to each Congressman and then shared with the law partners. The purpose, according to Criden and Johanson, was that by meeting and paying the Congressman, the sheik would have a "friendly face," someone "that sort of owed him a favor" and would "help the sheik come into this country" and also help members of his family. Criden suggested that Johanson should contact Myers and Lederer, since Johanson

knew both Congressmen. Johanson then contacted Myers and reported that Myers was willing to attend the proposed meeting.

The Payment to Myers. The first meeting with Myers took place on August 22, 1979, at the Travelodge International Hotel near Kennedy Airport on Long Island. Myers, Johanson, Criden, and Errichetti drove from New Jersey and Pennsylvania to the Pan American terminal at the airport, where they met for a brief conversation. As all four understood, only Myers and Errichetti were to attend the hotel meeting with the sheik's representative. Just prior to the meeting the FBI instructed Weinberg to inform Errichetti in the hotel lobby that the previously mentioned figure of $100,000 had been reduced to $50,000. Errichetti and Myers then met with Amoroso (who used the name Tony DeVito) and Weinberg in a hotel room. The meeting was recorded on videotape. Early in the conversation, Myers boasted of his influence in Congress. When Amoroso mentioned

his conversation on the yacht with Errichetti concerning the sheiks' possible immigration problems, Myers replied "Absolutely. Where could I be of help in this type of matter, first of all, is private bills that can be introduced." Myers explained that delay was important in immigration matters and said, "[I]f I wanta keep somebody in the country, all I do is introduce a private bill." Later in the conversation, Amoroso told Myers that his employer was planning major investments in the United States, possibly including something in Philadelphia. Myers agreed with Amoroso that such an investment in his district would give him "a little protection," and added that it would provide a reason to go "full force and, ah, not that I won't otherwise," and the "perfect opportunity to raise hell before Congress." At the end of the meeting Amoroso handed Myers an envelope containing $50,000 in $100 bills. Amoroso said, "Spend it well"; Myers replied, "Pleasure."

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After leaving the hotel, Errichetti met briefly with Criden at Kennedy Airport. Criden then returned to his law office in Philadelphia with the envelope Amoroso had handed to Myers. Criden reported to Cook that Errichetti had taken $15,000 for himself. Shortly thereafter Myers and Johanson arrived and conferred with Criden. Cook was then told that Myers had agreed to take only $15,000; of the remaining $20,000, Criden received $9,000 or $9,500, Johanson received $6,000 or $6,500, and Cook received $4,500.

At a subsequent meeting on January 24, 1980, at the Barclay Hotel in Philadelphia, Myers and Criden met with two other FBI undercover agents, posing as representatives of the sheiks. These agents were Michael Wald (using the name Michael Cohen) and Ernest Haridopolous (using the name Ernie Poulos). Meyers vehemently complained about ending up with only $15,000, after expecting to retain $50,000 for himself out of an anticipated payment of $100,000. As Myers pointed

out, "Who am I goin' to complain to...my congressman[?]" The undercover agents mollified Myers with an offer to pay an additional $35,000, which Myers said would be agreeable. On February 2, 1980, the date set for the additional payment, Myers was questioned at his home by FBI agents who identified themselves and said they were investigating the activities of Criden, Errichetti, Weinberg, DeVito (Amoroso), and Cohen (Wald). Myers denied knowing Weinberg, DeVito, or Cohen. The same day FBI agents interviewed Johanson. He admitted driving to Kennedy Airport for the August meeting and received a stack of cash. He said he realized the seriousness of this type of activity, but could not resist the chance to make easy money.

Claims at the Myers Trial. Myers acknowledged at his trial that he had retained $15,000 of the $50,000 handed to him by Amoroso. His defense, also adopted by his three co-defendants, was that all of his statements to Amoroso and

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Weinberg at the hotel on Long Island and to Wald and Haridopolous at the hotel in Philadelphia were what he termed "playacting." Myers, the only defendant of the four on trial to testify, claimed that Weinberg had told Errichetti, and Errichetti had told Myers, that nothing would ever have to be done for the sheiks in connection with immigration. According to Myers, Errichetti told him just prior to the August 22 meeting what he should say to impress the sheik's representatives. Myers claimed he did not intend to fulfill any of the promises he made at the meeting. Over the Government's objection, Judge Pratt instructed the jury that they should convict the defendants at the Myers trial of bribery only if they found that Myers was not "playacting." The jury's verdicts constitute a rejection of Myers' defense.

The Payment to Lederer. The initial contact with Lederer, as with Myers, was made by Johanson. He told Cook that Lederer had been briefed on the sheik's immigration problem, on

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the sheik's interest in investing in Philadelphia, and on the requirement that the Congressman personally receive the $50,000 being offered. Cook testified that Lederer said he "would gladly do it for Lou [Johanson] and all he wanted was a $5,000 contribution for the spring primary." On September 11, 1979, Lederer and Errichetti met with Amoroso and Weinberg at the Hilton Inn near Kennedy Airport. The meeting was recorded on videotape. Lederer said that Errichetti had briefed him on the sheik's immigration problems. When Amoroso said, "I understand that you can introduce legislation," Lederer replied, "Right, a bill. Private bill. Sure." Lederer then raised a concern that people might ask, "Why all at once does a Philadelphia Congressman want to help somebody...?" It would be "so much nicer," he continued, if the sheik had a "legitimate interest" in the port of Philadelphia. At the end of the meeting, Amoroso handed Lederer a bag containing $50,000 in $100 bills commenting, "I

hope you don't mind a brown paper bag with this in" and adding, "I hope you spend it well."

The next day Criden met with Cook in Philadelphia and handed him two envelopes. One marked "RL" (Raymond Lederer), contained $5,000; the other, marked "EC" (Ellis Cook), contained $4,500. Criden told Cook that $20,000 had gone to Errichetti, $5,000 to "Mel and Tony" (Weinberg and Amoroso), and the remaining $15,500 to Criden and Johanson. Later Johanson delivered Lederer's $5,000 share to the Congressman. On February 2, 1980, Lederer was questioned by FBI agents about the September 11, 1979, meeting. He denied that Errichetti was present, that private immigration bills were discussed, and that he had received a package or a brown paper bag.

Claims at the Lederer Trial. Lederer acknowledged at his trial that he had been given $5,000 of the $50,000 handed to him by Amoroso. His sole defense was that he had been entrapped and that there was no evidence of his predisposi-

tion to commit any offenses. The jury, charged with respect to the entrapment defense, rejected it by their verdicts.

The Payments to Thompson and Murphy. In September, 1979, Criden met Silvestri, the New Jersey businessman, in Florida and, knowing of Silvestri's contacts among Democratic politicians in New Jersey, inquired about Congressmen who might be willing to meet the sheik's representatives. Silvestri suggested Congressman Thompson. On October 4, Silvestri introduced Criden to Thompson, at which time Criden and Thompson spoke privately. That evening Criden told Weinberg that Thompson had agreed to assist and would meet Weinberg and Amoroso in Washington on October 9. Criden told Cook that he had made arrangements so that Thompson would not personally have to take the "package." Thompson and Criden met with Amoroso and Weinberg on the morning of October 9 at a townhouse on W Street maintained by FBI agents. The meeting was

videotaped. The discussion centered on the use of private immigration bills to prevent or at least delay deportation. When Amoroso stated, "That's what the money is for," Thompson replied, "I'm not looking for any money." The discussion of private immigration bills continued. Weinberg said the sheik wanted friends he could depend on, to which Thompson replied, "I don't know how many more ways I could say it." At this time no money was transferred.

Later that day Criden returned to the W Street house for further discussion with Weinberg and Amoroso. This meeting was videotaped. Criden complained that at the morning session Amoroso had altered their agreement, which, he claimed, called for no mention of money and Criden simply receiving a package. Weinberg and Amoroso denied making such an arrangement, stating that they were willing to have Criden take the package as long as Thompson acknowledged the money. Criden demurred, arguing that

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Thompson was too experienced and suspicious and could not be expected to act like Myers and Lederer. Criden agreed to talk with Thompson and telephoned to arrange a meeting with the Congressman.

On the evening of October 9, Thompson and Criden returned to the W Street house and met again with Amoroso. The meeting was videotaped. Criden said, "Frank understands the situation." Amoroso said, "There's the briefcase," pointing to a briefcase containing $50,000 in $100 bills. Thompson said to Criden, "You look after that for me will you?" Thompson and Criden then said they would bring others whom they would carefully screen. Later the group discussed possible investments of the sheik's money in New Jersey. Thompson suggested some possibilities, nothing noting that such investments would put him in a position to justify his support of the sheik. Amoroso, recalling the morning conversation, said that they had then been "shadow boxing," to

which Thompson replied, "Well, you have to be careful." Thompson said the first Congressman he might send would be his "pal" from New York, meaning Congressman Murphy. Thompson said he would "brief" his pal beforehand. As the meeting ended, Thompson and Criden both momentarily lifted the handle of the briefcase and Criden carried it out.

The next morning Criden told Cook in Philadelphia how the $50,000 was to be divided. Thompson had taken $20,000,[5] Errichetti would receive $10,000, Silvestri, $3,500, "Mel and Tony," $5,000, and $10,000 for Criden, Johanson, and Cook, leaving $1,500 unaccounted for.

On October 10, Thompson met with Congressman Murphy in Murphy's office. After Thompson returned from a brief trip, he arranged

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5. At trial Government contended that its evidence showed that Thompson had received a portion of the money delivered at the October 9 meeting, but his violation of the bribery and unlawful gratuity statutes was based entirely on the claim that he had received a portion of the money delivered to Murphy and Criden at the October 20 meeting.

for Murphy to meet Criden on October 19, and a meeting with the sheik's representatives was arranged for October 20. Murphy and Criden met with Amoroso and Weinberg at the Hilton Inn near Kennedy Airport on October 20. The meeting was videotaped. The discussion centered on the sheik's anticipated immigration problems. Amoroso said that his employers felt it was worth "whatever they have to put out" to obtain assistance. Amoroso explained that his employer had said, "[T]ake the money, go find the people that can, can do this for me." Criden replied, "All you have to do is get a hold of me. I will get a hold of Jack [Murphy]." Later, Weinberg said, commenting on the apparent absence of any problem, "As long as the man says he's going to take care of it. That's what counts." Murphy answered, "Yeah." Weinberg then made clear that it would be a "different deal" if any help was needed for anyone other than the two employers that had been mentioned. "[I]n other words," Amoroso ex-

plained, "these, what we're, what we're coming up front with, the money for is just for these two guys." Murphy answered, "Yeah." At the end of the meeting Amoroso picked up a briefcase containing $50,000 in $100 bills. Criden said, "Why don't you give that to Jack." Murphy said, "Howard why don't you take care of that." [6]

On October 22, Criden, carrying the briefcase containing $50,000, met with Cook in Philadelphia and explained the expected division of the money. $25,000 would be delivered to Thompson, of which Murphy would receive $15,000; Errichetti would receive $10,000, "Mel and Tony,"

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6. The Government contends that a close listening of the videotape reveals Murphy to have said, "Howard why don't you take care of that for me?" The Government's transcript of the tape, shown to the jury, contained this version. Murphy's transcript, also shown to the jury, omitted the final words "for me." Our listening of the tape did not catch the words "for me," though it was surely proper to permit the jury to decide for themselves. Whether or not Murphy's line ended with "for me," the echo from the Thompson-Criden dialogue of October 9 is unmistakable.

$5,000, and Criden, Johanson, and Cook the remaining $10,000. Later that day Thompson telephoned Criden and arranged for Criden to meet him at a motel in New Jersey. Upon his return to Philadelphia, Criden told Cook that he had delivered the money to Thompson.

Subsequent events cast further light on the issue, seriously contested at the Thompson-Murphy trial, as to whether either Thompson or Murphy had received money at or as a result of the October 20 meeting. On November 8, Thompson gave Criden the name of Congressman John Murtha of the Twelfth District of Pennsylvania as a next "candidate" for the sheik's representatives. Criden passed Murtha's name along to Amoroso and Weinberg later that day at the conclusion of a meeting the three of them had with Laurence Buser, a friend of Murphy's. The purpose of this meeting was to discuss a proposed shipping deal to be financed by the sheiks in which Murphy, according to Buser, would be a "silent part-

ner." Thompson then undertook to recruit Murtha. As Murtha testified at trial, Thompson told him, in a discussion on the floor of the House of Representatives, about the wealthy Arabs who might need assistance on immigration matters. In a second conversation with Murtha on the House floor, Thompson told Murtha that there would be $50,000 in "walking around money" for Congressmen willing to help. Thompson told Murtha he had already enlisted Murphy in the venture. Ultimately, no money was ever paid to Murtha.

On January 10, 1980, Murphy, Buser, and Criden met with Amoroso and Weinberg at the W Street house. The meeting was videotaped. The discussion concerned the proposed shipping deal, as to which Murphy said he was "not in." Later Amoroso spoke privately with Murphy. In this conversation Murphy acknowledged the dangers of speaking about money and then, in the Government's view, engaged in playacting of his own in denying receipt of any money. Murphy told

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Amoroso, "[A]ny time money's mentioned where a public official is mentioned, there-there's automatically an ability to link 'em to something illegal or to taking a consideration for something, uh, that he's supposed to do or use his office to do and there's, no public official would ever be involved in anything like that.... Particularly Thompson, myself, or Murtha. We'd never do anything like that. See?" Amoroso said, "[Y]ou're being coy with me." Murphy said, "Sure." Then when Amoroso said he had been reluctant to give Murphy money, Murphy said, "You didn't, you didn't give me any money... I never received, any money from anyone." The conversation continued with the two discussing future plans for Murphy to meet the sheik. After this meeting Murphy requested a private investigator to check our Weinberg, "DeVito," and Abdul Enterprises. Murphy said he thought they were either phonies or government agents.

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On February 2, 1980, FBI agents questioned Thompson about his October 9 meeting with Amoroso and Weinberg. Thompson denied that immigration matters had been discussed and denied that anyone had received a briefcase.

Claims at the Thompson-Murphy Trial. At trial Thompson denied receiving any money. He testified that his sole purpose is going to the meetings with the sheik's representatives and arranging introductions to Murphy and Murtha was to attract investments to his and their districts. He claimed that he thought the briefcase handed to Criden at the October 9 meeting had contained investment proposals. Murphy neither testified nor presented defense witnesses at trial. His defense, as argued in summation, was that he had not received any money.

III.

We turn first to a series of broad claims asserted, with slight variations, by some or all seven of the appellants as grounds for rejecting

the lawfulness of their convictions. These are claims that in several distinct, though related, respects these convictions were obtained in violation of an outer limit of fairness guaranteed by the Due Process Clause of the Fifth Amendment to all persons whenever the Government of the United States acts to detect and prosecute criminal activity. Some of the claims are reenforced by the contention that the Abscam investigation and prosecution of Congressmen, and those charged with aiding and abetting them and conspiring with them, also violated constitutional protections of Members of Congress, either contained explicitly in Speech or Debate Clause, U.S. Const. art. I, §6, or implicitly in the doctrine of separation of powers.

A. Lack of Prior Suspicion.

Appellants contend that it is unconstitutional for the Executive Branch of the Government to predicate the conviction of a Member of Congress upon a criminal opportunity created by

agents of the Executive Branch, in the absence of probable cause, or perhaps some lesser standard of suspicion, to believe that the Congressman has previously engaged in criminal activity. The argument emphasizes the risk of abuse: if the practice is permitted, it might be directed at Congressional targets selected for political reasons, and such political targeting, though violating the First Amendment, **see United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972)**, would be difficult to establish and therefore too readily available for use by malevolent officials.[7] The argument also suggests that it is simply not the constitutional business of the Executive Branch to

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7. Several appellants in fact contend that in these cases the Government targeted the defendant Congressmen for political or other impermissible reasons. This claim is flatly contradicted by the evidence. The Government had no role whatever in the selection of any of the four Congressmen involved in these appeals. Criden and Johanson selected Congressmen Myers and Lederer. Silvestri selected Congressmen Thompson. Thompson selected Congressman Murphy.

to test the virtue of Members of a coordinate branch of government.

In **Myers I** we canvassed the consideration supporting and opposing this claim and concluded that while the claim raised important issues of public policy appropriate for the attention of the Executive and Legislative Branches, it did not present a court with a ground for declaring that the Constitution had been violated, 635 F.2d at 938-39. Our reflection upon the issues has been deepened by the passage of time and focused more sharply by the vast record assembled on these appeals, but our conclusion had not been altered. The Constitution permits Congress to apply the criminal law enforcement process to a Member's acceptance of a bribe. **United States v. Brewster, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972).** A Congressman is as entitled as any other citizen to the constitutional and statutory protections that limit the

power of the Government to investigate and prosecute criminal offenses. But, with the exception of section 6 of Article I, which explicitly affords immunity to Senators and Congressmen "for any Speech or Debate in either House" and privilege from arrest for most criminal offenses during attendance at sessions of Congress, the Constitution does not provide Members of the Legislative Branch with any extra protections beyond those guaranteed to all citizens. Specifically, Members of Congress enjoy no special constitutional rule that requires prior suspicion of criminal activity before they may be confronted with a governmentally created opportunity to commit a crime.

[1-3] What is available in such circumstances is the traditional defense of entrapment, which prevents conviction of a person induced to commit a crime unless the prosecution can establish the person's predisposition to commit the crime. **See Sherman v. United States, 356 U.S. 369, 78 S. Ct. 819, 2 L.Ed.2d 848 (1958); Sorrells**

v. United States, 287 U.S. 435, 53 S. Ct. 210, 77 L.Ed. 413 (1932). The entrapment defense exonerates a defendant who engages in criminal behavior when the activity of government agents "implant[s] in the mind of an innocent person the disposition to commit the alleged offense and induce[s] its commission," Sorrells v. United States, supra, 287 U.S. at 442, 53 S. Ct. at 212. But the defense of entrapment is not established simply because government agents "afford opportunities or facilities for the commission of the offense," Sorrells v. United States, supra, 287 U.S. at 441, 53 S. Ct. at 212, or engage in "deceit." United States v. Russell, 411 U.S. 423, 435-36, 93 S. Ct. 1637, 1644-45, 36 L.Ed.2d 366 (1973). The legal defense of entrapment is not established whenever a defendant is caught by a ruse.

Although the defense of entrapment was available to all seven appellants, none except Lederer elected to assert the defense at trial, or request a jury instruction on the issue. The de-

fendants in the Myers and Thompson-Murphy trials made no attempt to avail themselves of the limited opportunity a defendant has to defend on the dual grounds of non-involvement and entrapment, see United States v. Valencia, 645 F.2d 1158, 1170-72 (2d Cir. 1980) (amended 1981). They claimed only that bribery had not occurred, the Myers defendants on the ground that Myers was only "playacting,"--pretending to promise official action--and Thompson and Murphy on the ground that proof was lacking that they had accepted money for promises of official action. We do not doubt that when an entrapment defense is raised by evidence of inducement, either through cross-examination or affirmative evidence, a defendant is entitled to have a court assess, as with every other element of an offense, whether the record contains sufficient evidence from which a reasonable jury can conclude beyond a reasonable doubt, United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972), that the prosecution has proved the

defendant's predisposition to commit the offense. **See United States v. Valencia, supra, 645 F.2d at 1167-68** (evidence of predisposition sufficient to create issue for jury). But a defendant is not entitled to a court ruling on the minimal sufficiency of the prosecution's evidence as to a defense that the accused has not placed in issue. A defendant's failure to assert an entrapment defense prevents the prosecution from responding to evidence of inducement by presenting evidence of the defendant's predisposition to commit the crime. We hold that a defendant who fails to assert entrapment as a factual defense at his trial, cannot assert it as a legal defense to his conviction. **See United States v. Bishop, 367 F.2d 806, 809-10 (2d Cir. 1966).**

[4] Although Lederer, having asserted the defense of entrapment at trial, can challenge the sufficiency of the evidence of his predisposition, his claim is without merit. In seeking only $5,000 for himself out of the $50,000 he received,

Lederer displayed neither the greed of Myers nor the guile of Thompson and Murphy; nevertheless, the evidence at his trial fully entitled the jury to find his predisposition beyond a reasonable doubt. Predisposition may be established by "the accused's ready response to the inducement," **United States v. Viviano, 437 F.2d 295, 299 (2d Cir.), cert denied, 402 U.S. 983, 91 S. Ct. 1659, 29 L.Ed.2d 149 (1971); United States v. Becker, 62 F.2d 1007, 1008 (2d Cir. 1933).** The videotape of the September 11 meeting reveals Lederer responding with alacrity. As he assured the sheik's representatives, "I'm not a Boy Scout."

B. Excessive Government Role.

Appellants contend that even if the traditional entrapment defense fails, whether factually in Lederer's case of procedurally as to the other appellants, the conduct of Abscam violated standards of due process because the Government's role in the investgation was excessive and funda-

mentally unfair. Unlike the entrapment defense, which focuses on the defendant's predisposition, this due process claim focuses on the conduct of the government agents.[8] There are several strands to the argument. First, it is urged, the Government created the crimes. The elaborate contrivance of Abscam is claimed to extend beyond the legitimate role of law enforcement in detecting crime into a forbidden area of instigating crime. Second, the appellants contend that the inducements offered to the Congressmen for their corrupt promises of official action were so excessive that a court should declare them to exceed limits claimed to inhere in the Due Process Clause.

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8. The appellants sometimes refer to this claim as "entrapment as a matter of law." We prefer to characterize it as a due process claim, leaving the phrase "entrapment as a matter of law" to describe the claim that, with respect to a traditional defense of entrapment, the evidence of predisposition was insufficient as a matter of law to permit the jury to find that the prosecution had proved predisposition as a matter of fact. Unlike the claim of entrapment as a matter of law, the due process claim of excessive governmental inducement is available to a defendant whether or not he asserted an entrapment defense at trial, since this claim is independent of evidence concerning predisposition.

Third, appellants in the Myers case contend that the Government agents, notably Weinberg, "coached" Congressman Myers into committing the crimes by having Errichetti and Criden tell Myers what to say at the videotaped meetings and simultaneously assuring him that he need not intend to keep the promises he was making since he would never be called upon to deliver.

In assessing this collection of claims, we acknowledge the intimations in decisions of the Supreme Court and this Court that the due process requirement of fundamental fairness may have a special pertinence when Government creates opportunities for criminal conduct in order to apprehend those willing to commit crimes. See Hampton v. United States, 425 U.S. 484, 491-95, 96 S. Ct. 1646, 1650-52, 48 L.Ed.2d 113 (1976) (Powell, J., concurring); United States v. Russell, supra, 411 U.S. at 431-32, 93 S. Ct. 1642-43; United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973); see also Archer v. Commissioner of Corrections, 646 F. 2d 44, 46-47 (2d Cir.), cert.

denied, 454 U.S. 851, 102 S. Ct. 291, 70 L.Ed.2d 141 (1981) (Archer II). At the same time, we recognize that, with the exception of a decision by a divided panel of the Third Circuit, United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), convictions have not been invalidated by federal appellate courts on grounds of excessive government involvement after the decisions of the Supreme Court in Russell and Hampton narrowed the availability of this defense. As the decisive concurring opinion of Justice Powell in Hampton stated, "Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction," 425 U.S. at 495 n. 7, 96 S. Ct. at 1652 n. 7. Our own decision in Archer II, though questioning an extreme example of governmental initiation of a criminal opportunity, if not the crime itself, rejected the due process claim. 646 F.2d at 47. Moreover, as we recently observed in United States v. Alexandro, 675 F.2d 34 (2d Cir. 1982),

and Abscam conviction of an employee of the Immigration and Naturalization Service, the due process claim, in the rare instances when successful, has prevailed to restrain law enforcement activities that involve coercion, e.g., **Watts v. Indiana, 338 U.S. 49, 69 S. Ct. 1347, 93 L.Ed. 1801 (1949),** or outrageous violation of physical integrity, e.g., **Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L.Ed. 183 (1952).**

[5] 1. **Instigation.** The appellants' claim of excessive governmental involvement in the instigation of criminal conduct is not supported by the facts. Though the "sting" was surely elaborate, its essential characteristic was the creation of an opportunity for the commission of crime by those willing to do so. The Government produced people with fictitious identities ready to pay bribes to Congressmen. Word of availability of bribe money was made known. From that point on, the essential conduct of the agents and their paid informant was to see who showed up to take

the bribes and videotape them in the act of doing so.[9] Whatever may be the due process limit of governmental participation in crime, it was not reached here. See Hampton v. United States supra; United States v. Russell, supra; United States v. Jannotti, 673 F.2d 578 (3d Cir.) (en banc), cert. denied, ___U.S.___, 102 S. Ct. 2906, 73 L.Ed.2d 1315 (1982); United States v. McQuin, 612 F.2d 1193, 1196 (9th Cir.), cert. denied, 445 U.S. 954, 100 S. Ct. 1607, 63 L.Ed.2d 791 (1980); United States v. Quintana, 508 F.2d 867, 876-78 (7th Cir. 1975).

2. Inducement. Appellants contend that the size of the inducements offered to the Congressmen were excessive. They refer not to the $50,000 amounts of the bribes, but to the offers

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9. As Judge Pratt pointed out, Murphy's conduct is more accurately described as the taking of money, rather than a bribe, since the jury acquitted him of the bribery offense and convicted him of accepting an unlawful gratuity. 527 F.Supp. at 1225 n. 14.

of financing multi-million dollar projects in the Congressmen's districts. We have considerable difficulty with the premise of this argument, which is that a Congressman is privileged to take $50,000 bribe so long as he simultaneously believes he is bringing the benefits of investments to his district. The argument is an affront to all the law-abiding Member of Congress and state officials who consider it a normal part of their public responsibilities to promote business activity for the benefit of their constituents. Moreover, if appellants are contending that there are due process limits on the size of an inducement that a government agency may offer and condition on acceptance of a bribe, the facts of these cases belie the fanciful image of four Congressmen so anxious to bring investment benefits to their districts that they reluctantly accept bribes on which they thought the investments were conditioned. Quite to the contrary, the evidence shows four Congressmen jumping at the chance to take

a bribe and discussing investments in their districts as a convenient cover to justify their rendering of purchased legislative services. As Thompson said, anticipating possible criticism for helping the sheik, "I'm in a position to say well of course I'm helping this guy. Why shouldn't I help this guy...his money is helping my guys work everyday." Myers put more bluntly: an investment in the district "gives me a little protection."

Thompson contends that inducement in violation of due process limits occurred in his case because the agents persisted in offering money after his initial rejection on the morning of October 9, 1979. The claim is spurious. At the morning meeting Thompson did not reject a bribe, he rejected its payment under circumstances he feared would be incriminating. Then in the afternoon Criden met first with Amoroso and Weinberg and later with Thompson. At the meeting on the evening of October 9, what occurred was

not unfair inducement, but simply the offering of money pursuant to an arrangement developed by Thompson and Criden whereby the bribe could be accepted while preserving what Thompson mistakenly thought would be deniability.

3. **"Coaching."** Appellants in the Myers case claim that excessive governmental activity, breaching due process limits, is to be found in the alleged conduct of Weinberg in "coaching" Myers to say falsely that he would introduce private immigration bills while assuring him that he would not be called upon to deliver on his premises. The claim is that Weinberg gave Errichetti and Criden the script for a charade that Myers would enact before the television cameras, and Errichetti and Criden then instructed Myers, in effect, how to obtain money under false pretenses.

In the District Court, Judge Pratt accepted, for purposes of these trials, the legal sufficiency of the "playacting" defense,[10] and afforded the

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10. We suspect that this ruling reflects the not (footnote cont'd)

defendants in the Myers case wide latitude to present evidence in support of their claim. He then submitted the claim to the jury, under an instruction that the jury was not to convict unless the Government proved beyond a reasonable doubt that a Congressman who had accepted money in return for a promise to introduce immigration bills had done so with the intention of carrying out that promise. In other words, the jury was to acquit on the bribery charge if they accepted the "playacting" defense. The Myers jury obviously rejected the defense, and, on the evidence before them, they were certainly entitled to do so. Despite the existence of some evidence that Weinberg, through Errichetti and Criden, had encouraged the Congressmen to "come on strong," as Weinberg acknowledged in his testimony at the Myers trial, the jury was entitled to conclude

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(footnote cont'd)
uncommon practice of district judges, faced with a defense claim of questionable legal validity in the course of protracted proceedings, to err on the side of caution and permit the defense to make its factual claim to a jury, rather than risk a reversal and retrial.

that this was no charade. An entirely plausible inference even from the defendants' evidence, and the one the jury apparently accepted, is that Weinberg was not urging the Congressmen to utter promises they were reluctant to make and did not intend to keep, but was simply anxious to make sure that they fully and unambiguously expressed on videotape the promises they were all too ready to make and fully intended to keep.

[6] Moreover, after the trials were concluded, Judge Pratt afforded the defendants a full opportunity at the "due process" hearing to amplify the record to persuade him, as the trier of fact on the due process claim, that only a charade had occurred. After conducting a wide-ranging hearing, the District Judge found the claim unsupported as a factual matter, and his findings are not clearly erroneous.

However, circumstances in the record prompt us not to place this portion of our deci-

sion solely on the traditional deference an appellate court extends to the fact-finding of a jury and a trial judge when supported by sufficient evidence. The record contains one striking instance, in the early stages of Abscam, when Weinberg unquestionably pursued a course of conduct with Senator Williams that reveals precisely the sort of "coaching" for "playacting" that some of these appellants claim occurred with them.[11] In a videotaped conversation with Senator Williams on June 29, 1979, Weinberg made these statements:

"He's only interested in you. You gotta tell him how important you are, who you are, what you can do and you tell him in no uncertain terms 'without me there is no deal.' 'I'm the man. I'm the man who's gonna open the doors. I'm the man who' gonna do this and use

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11. We intimate no opinion with respect to the effect of this episode on Senator Williams' appeal from his conviction.

my influence and I guarantee this.' Follow me? All bullshit.

....

And that's it, it goes no further, it's all talk, all bullshit. That's all he wants to hear it.

....

It's...it's a walk-through. You should be out of there in twenty minutes.

....

Come on, 'Me, I'm the power.' And that's it. It's as simple as that. You're on stage for twenty minutes.

....

So you ready to go on stage?"

When this "coaching" session came to the attention of the office of the United States Attorney for the District of New Jersey, prosecutors there strenuously protested Weinberg's conduct and complained to Department of Justice officials and the prosecutors in charge of Abscam in the Eastern District of New York. That protest led

to a meeting on August 9, 1979, at the home of Special Agent Larry Schneider of the FBI office in New Jersey, attended by Weinberg, prosecutors from the Eastern District of New York and the District of New Jersey, and FBI agents. What was said at that meeting was a matter of dispute at the due process hearing before Judge Pratt. FBI agent Martin Houlihan recounted an exchange between Edward Plaza, then an Assistant United States Attorney in New Jersey, [12] and Weinberg. According to Houlihan, Plaza told Weinberg that he could not put words into people's mouths;

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12. Judge Pratt concluded that both Plaza and another Assistant United States Attorney from New Jersey, Edward Weir, were motivated to criticize the Abscam operation by jealousy over the control by prosecutors from the Eastern District of New York of an investigation uncovering corruption in the District of New Jersey. **527 F.Supp. at 1245-47.** Professional rivalry may have been afoot, but our review of the record inclines us to think that Plaza and Weir were expressing in good faith concerns based largely on their sense of the proper administration of justice.

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Weinberg replied "to the effect that if he didn't say things like that, then we wouldn't be making any cases." Agent Schneider supported Houlihan's account with the following testimony: at a meeting a few days later with Thomas P. Puccio, attorney in charge of the Organized Crime Strike Force in the Eastern District, Weinberg denied ever saying that he had "to put words in people's mouths or we won't make any cases," to which Schneider and Houlihan promptly replied, in substance, "Mel, that's not so, you did say that."

Schneider also testified that, when the Willaims "coaching" session was discussed at the August 9 meeting and Weinberg was admonished to refrain from such conduct, be (Schneider made "a statement to the effect 'Yeah, at least if you're going to coach him you don't tape it." At the hearing, Schneider characterized this as a "joking remark," which "was said in a joking matter, as far as I understood everybody under-

stood it to be a joking matter." To put it mildly, this is an odd subject for humorous bantering.

Not having heard the participants who testified about the August 9 meeting, we are in no position to assess credibility and decide whether Weinberg made the remark attributed to him. We note that Judge Pratt's discussion of the August 9 meeting does not make a finding of fact on this point. 527 F.Supp. at 1235. Judge Pratt did find that, by the time of the August 9 meeting, the Williams "coaching" incident was "past history, and the tehnique was not thereafter repeated." Id. This finding relates to whether Weinberg himself did any "coaching" of the Congressmen. It does not prelude the distinct possibility that Weinberg encouraged Errichetti and Criden to handle the "coaching" for him. Judge Pratt expressed the view that, if this happened, the Government bore no responsibility for whatever Errichetti and Criden might have told the Congressmen. Id. at 1735-37. If impro-

priety of constitutional dimension had arisen from Weinberg's "coaching," we would not be so certain as Judge Pratt that the taint would be dissipated by transmission through middle-men. See United States v. Valencia, supra 645 F.2d at 1168-72; Note, Entrapment Through Unsuspecting Middlemen, 95 Harv. L. Rev. 1122 (1982).[13] There

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13. Although there is room for fair dispute as to the circumstances in which government may be held responsible for entrapment by a third party, see, United States v. Valencia, 645 F.2d 1158, 1176 (2d Cir.1981) (Van Graafeiland, J., dissenting from denial of rehearing en banc), the defense is available, of course, where government agents act through private citizens," United States v. Buie, 407 F.2d 905, 908 (2d Cir.), aff'd on other grounds sub nom. Minor v. United States, 396 U.S. 87, 90 S. Ct. 284, 24 L.Ed.2d 283 (1969); see Lopez v. United States, 373 U.S. 427, 83 S. Ct. 1381, 10 L.Ed.2d 462 (1963); Johnson v. United States, 317 F.2d 127, 128 (D.C. Cir. 1963). Appellants' claim of indirect "coaching" presents the strongest circumstance for attributing third-party conduct to a government agent, since this is a claim of what might be called "instructed transmission" of an inducement: Weinberg, acting as agent for the Government, allegedly gave "coaching" directions to middlemen Errichetti and Criden with specific instructions that they should relay his directions to the Congressmen. The justification for holding government accountable for a middleman's behavior would be less compelling if the claim were one of "uninstructed

(footnote cont'd)

is a substantial risk that Weinberg, having been admonished for "coaching" Senator Williams, and, even on the Government's version, having heard FBI agents and prosecutors "joke" about his not taping further "coaching" sessions, did decide to encourage Errichetti and Criden to undertake similar "coaching" ventures with the Congressmen.[14]

(footnote cont'd)

transmission": middleman takes it upon himself to pass an agent's inducement along to others. Government responsibility has been rejected where the circumstances showed what might be called "caused" inducement: an agent induces a middleman to commit a crime, and the middleman, responding to the pressure upon him, takes it upon himself to induce another person to participate in the crime. **E.g., United States v. Reed, 526 F.2d 740 (2d Cir. 1975), cert. denied, 424 U.S. 956, 96 S. Ct. 1431, 47 L.Ed.2d 361 (1976). See generally United States v. Valencia, supra, 645 F.2d at 1178 (explication of Reed facts).**

14. At the Philadelphia due process hearing before Judge Fullam, Errichetti and Criden, testifying under an arrangement that precluded use of their testimony against them, both alleged that, acting at Weinberg's behest, they had told the Congressmen that money could be obtained simply by pretending to give assurances of using Congressional influence.

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Since we are left with at least a measure of unease as to whether some indirect "coaching" occurred, we prefer to consider the substance of appellants' claim.

[7] (3)a. **"Coaching" and the "Playacting" Defense.** The appellants' "coaching" claim seeks to create a due process violation by combining an erroneous interpretation of the bribery statute with an unrealistic assessment of the facts. The first step in the argument is taken when the appellants contend that "playacting" is a defense to bribery. It is not.[15] Since Myers appears to be the first public official in a reported federal decision to defend a bribery charge on the ground that he intended to keep the bribe but not to keep the promise he made to the bribe-payer,[16]

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15. Appellants have no basis for complaint because Judge Pratt gave them an opportunity, accepted by defendants in the Myers trial, to try to persuade the jury that the facts supported a defense to which they were not entitled.

16. Cases have considered and rejected the somewhat similar defense that the bribe-taker was unable to be influenced because the official act (footnote cont'd)

it is not surprising that the appellate reports have not dealt explicitly with the claim. The statute proscribes the corrupt receipt of money by a public official "in return for: (1) being influenced in his performance of any official act...." The phrase "in return for" appeared in the statute in 1962 when Congress revised and consolidated various public corruption statutes. This phrase makes it clear that bribery under **section 201(c)** requires a promise of a future act in exchange for the money given to the public official, an element not required for receipt of an unlawful gratuity under **section 201(g)** which punishes receipt of a gratuity paid "for or because of" performance of a future or past official act.

(footnote cont'd)

for which the bribe was paid either was beyond his authority, **see e.g., United States v. Carson, 464 F.2d 424, 433 (2d Cir.), cert. denied, 409 U.S. 949, 93 S. Ct. 268, 34 L.Ed.2d 219 (1972); United States v. Heffler, 402 F.2d 924 (3d Cir. 1968); cert. denied, 394 U.S. 946, 89 S. Ct. 1280, 22 L.Ed.2d 480 (1969)**, or had already been taken, **see e.g., United States v. Arroyo, 581 F.2d 649, 653-57 (7th Cir. 1978), cert denied, 439 U.S. 1069, 99 S. Ct. 838, 59 L.Ed.2d 34 (1979).**

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United States v. Niederberger, 580 F.2d 63, 68-69 (3d Cir.), cert. denied, 439 U.S. 980, 99 S. Ct. 567, 58 L.Ed.2d 651 (1978); United States v. Brewster, 506 F.2d 62, 71-72 (D.C. Cir. 1974). As the Supreme Court said in United States v. Brewster, supra 408 U.S. at 526, 92 S. Ct. at 2544, construing the bribery statute, "[t]he illegal conduct is taking or agreeing to take money for a promise to act in a certain way." But the text of the 1962 revision perpetuates the preexisting ambiguity as to whether the promise given by the public official must be one that he intends to carry out. A prior statute, 18 U.S.C. §205 (1958), had required that a Congressman receive the bribe "with the intent to have his action... influenced." This somewhat awkward phrasing left it unclear whether the Congressman must intend to take action or need only intend to receive money with awareness of the purpose for which the briber gives it.

The present version, as revised in 1962, deletes "intent" from the description of the conduct

specifically proscribed, and instead requires that the overall offense be committed "corruptly." The specific conduct is rephrased as receipt of money in return for "being influenced" in official actions. The meaning of the new language (and probably that of the prior language as well) is clarified by the report of the House Committee on the Judiciary:

"The language used in subsection (c) [of section 201] emphasizes that it is the purpose for which the recipient knows the bribe is offered or given when he solicits, receives, or agrees to receive it which is determinative of criminality. Some courts have given this interpretation to the present section 202.[17] (See, e.g., Woelfel v. United States, 237 F.2d 484, 488 [4th Cir.]; Whit-

17. Section 202 of Title 18, as it read before the 1962 revision, proscribed acceptance of bribes by various officials of the United States. Using language similar to former Section 205, covering receipt of bribes by Members of Congress, section 202 proscribed receipt "with intent to have his decision or action...influenced thereby." 18 U.S.C. §202 (1958).

ney v. United States, 99 F.2d 327, 331 [10th Cir.].)"

H.R. Rep. No. 748, 87th Cong., 1st Sess. 18 (1961). Thus, "being influenced" does not describe the Congressman's true intent, it describes the intention he conveys to the briber in exchange for the bribe. The citation in the House Report to the **Whitney** decision underscores the point. On the page of the **Federal Reporter** to which the Report refers appear these sentences (and no others of consequence):

"The evidence shows that [the public official] not only took but solicited money in connection with said sales, and whether his action was influenced is immaterial. The money was solicited and taken for the purpose of causing [the people who paid the bribe] to believe that they would get more consideration than they would otherwise."

Whitney v. United States, 99 F.2d 327, 331 (10th Cir. 1938). As the Seventh Circuit has said, in

rejecting a claim that a bribe was not received in return for being influenced because the event requiring influence had already occurred, "The phrase ['in return for'] brings into play the purpose of the bribe and thus the mind of the bribepayer." **United States v. Arroyo, 581 F.2d 649, 654 (7th Cir. 1978), cert. denied, 439 U.S. 1069, 99 S. Ct. 838, 59 L.Ed.2d 34 (1979).** Construing a similar statute proscribing receipt of money for the promise of a public office, **18 U.S.C. § 215 (1952) (a predecessor of 18 U.S.C. § 201 (1976))**, the Supreme Court upheld a conviction despite the fact that the public office, though authorized, was not in existence. **United States v. Hood, 343 U.S. 148, 72 S. Ct. 568, 96 L.Ed. 846 (1952).** "Whether the corrupt transaction would or could ever be performed is immaterial. We find no basis for allowing a breach of warranty to be a defense to corruption." **Id. at 151, 72 S. Ct. at 569.** With respect to the bribery

statute, we believe the defense of fraud is equally unavailable.[18] If Myers was "playacting" and giving false promises of assistance to people he believed were offering him money to influence his official actions, he violated the bribery statute.[19]

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18. This construction of the statute is especially appropriate when the public officials who receive bribes are Members of Congress, since the Speech or Debate Clause bars evidence of their subsequent official action or the reasons for it, **United States v. Johnson, 383 U.S. 169, 86 S. Ct. 749, 15 L.Ed.2d 681 (1966)**, evidence that would frequently be highly probative of whether, at the time of the bribe, the Member intended to take official action. It is unlikely that Congress, aware of the special protection its Members enjoy under the Speech or Debate Clause, included in the offense of bribery an element for which the Clause insulates the pertinent evidence.

19. We recognize that some opinions have described the bribery statute in language that can be read to suggest that the bribe-taker must intend to take the promised official action. **See United States v. Brewster, 506 F.2d 62, 70-76 (D.C. Cir. 1974); United States v. Irwin, 354 F.2d 192, 195-96 (2d Cir. 1965), cert. denied, 383 U.S. 967, 86 S. Ct. 1272, 16 L.Ed.2d 308 (1966).** We do not give controlling weight to such dicta, since they were expressed without any need to consider the bizarre defense that the bribe-taker did not intend to keep his corrupt promise. Consequently, the opinions had no occasion to discuss the 1962 House Judiciary Committee Report, which is so pertinent to the claim in this case.

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[8] 3(b). "Coaching" as Inducement. With the statute thus understood, the "coaching" claim does not provide a legal defense simply because some "coaching" may have occurred; the claim would have merit only if there were insufficient evidence of the defendants' predisposition to "play-act" or if the agents' conduct were so extreme as to exceed due process limits. We have already ruled that the entrapment defense is without merit in Lederer's case and is procedurally unavailable to the other appellants because they elected not to assert it at trial. The entrapment defense fares no better when the appellants shift their focus from the size of the inducements to Weinberg's alleged suggestion of a script. Prompt acquiescense shows predisposition to accept a bribe, whether or not a promise of official action is intended to be kept.

[9] Thus, appellants are left with a claim that the "coaching" was so outrageously coercive as to violate due process, wholly apart

from the traditional defense of entrapment. The record does not remotely support the claim. Even if all of the appellants' evidence is credited, a generous assumption that strains credulity, it shows at most that Errichetti and Criden, perhaps prompted by Weinberg, laid out before each Congressman a scheme for pocketing $50,000 by falsely promising to introduce private immigration bills. Suggesting how easy it is to commit a crime hardly establishes a due process violation. The "coaching," if it occurred, barely qualifies as any inducement at all; if the script was supplied, no one was coerced into playing his part. Due process challenges to an undercover agent's encouragement have been rejected when one defendant was solicited twenty times before committing an offense, **United States v. Esquer-Gamez, 550 F.2d 1231 (9th Cir. 1977)**, and when another defendant was tempted by a million-dollar cash deal and prodded by veiled threats, **United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977), cert.**

denied, 436 U.S. 926, 98 S. Ct. 2820, 56 L.Ed.2d 769 (1978). Whatever conduct might transgress the standard outlined in Hampton and Russell, the facts of the Abscam investigation are not even close to the line. United States v. Alexandro, supra; United States v. Janotti, supra. The bare suggestion to Congressman that he take a bribe, even for a promise he need only pretend to make, surely does not violate a constitutional standard of "outrageous" behavior. The public has the right to expect that their public officials have sufficient integrity not to capitulate at such a suggestion. Whatever the public's expectation, the record reveals that these Congressmen were not children of Hamelin, seduced by the piping of Melvin Weinberg.

C. Impairment of Accurate Fact-Finding.

Appellants allege that the conduct of the Abscam investigation denied them due process for a variety of reasons that are combined in support of a broad claim that the Government prevented

the presentation to the jury of an accurate account of the events. With the exception of traditional arguments that exculpatory evidence was withheld in violation of **Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)**, the due process foundation of this general area of attack is more the product of resourceful argument than precedent. To be successful, this attack must overcome our well-established reluctance to dismiss criminal prosecutions because of faulty Government investigation. **See United States v. Brown, 602 F.2d 1073 (2d Cir.), cert. denied, 444 U.S. 952, 100 S. Ct. 427, 62 L.Ed.2d 323 (1979)**; cases cited **id. at 1076-77.** It might be thought that the specific constitutional guarantees concerning criminal procedure, e.g., the Confrontation Clause of the Sixth Amendment, and the Federal Rules of Evidence provide sufficient standards for determining the quality of evidence appropriate to support a finding of guilt. Yet the Due Process Clause, with its principle of con-

stitutionally required fairness, has been applied to develop minimum standards concerning the accuracy of evidence, notably in the area of eyewitness identification testimony. See Manson v. Braithwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977); Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L.Ed.2d 1199 (1967). Appellants invite us to frame comparable standards for undercover investigations.

1. **Deliberate Ambiguity.** An interesting component of the argument, advanced by Thompson and Murphy, maintains that when the Government is in control of an undercover operation, as contrasted with merely observing events in which no governmental agent is involved, due process requires the investigators to eliminate or at least minimize ambiguities in the critical events that form the basis of the criminal offense. Otherwise, they contend, the Government needlessly creates risk of erroneous fact-finding by the jury on the ultimate issue of guilt or innocence. Relating

the claim to these cases, they argue that an undercover offer of a bribe must be expressed in terms that leave no uncertainty that money is being transferred to a Congressman and that it is being paid to influence his official actions. As counsel for Murphy contends, "Congressman Murphy was denied the opportunity to say 'no,' [**see Myers I, supra, 635 F.2d at 939**] because the Government did not clearly convey its invitation to corruption." (Murphy Br. 50.)

Perhaps at some point deliberate governmental efforts to render ambiguous events over which agents can exercise considerable control would transgress due process limits of fundamental fairness. Wherever those limits might be, they have not been crossed in these cases. Undercover agents offering bribes to Congressmen are entitled to simulate the guarded conversation that would be expected of those proposing an unlawful venture. **Cf. United States v. Reynoso-Ulloa, supra 548 F.2d at 1338-39.** They need not

say, "Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action."

In the **Myers** and **Lederer** cases, the bribe offers created no risk of ambiguity. There were ample references to money and to its payment in exchange for assistance with private immigration bills, and both Myers and Lederer directly received envelopes filled with cash under circumstances leaving no doubt as to their knowledge of the contents. The episodes involving payments to Thompson on October 9 and to Murphy on October 20 are somewhat more ambiguous. Although the events and conversations at those meetings are captured on videotape, the sights and sounds, considered in isolation, create fair questions of fact as to whether Thompson and Murphy knew that money was in the briefcase, and whether the money was received by the Congressmen. Both Congressmen contend that they did not know that the briefcase contained cash and that on both occasions Criden received the briefcase and did

not share its contents with either Thompson or Murphy.

Whatever ambiguity arises from the manner in which the bribes were offered at the meetings on the eventing of October 9 and on October 20 is directly attributable to the cautious ground rules insisted upon by Criden and Thompson in the hope of insulating Thompson and those he recruited from culpability. It is plainly inferable from the taped conversations of the three meetings on October 9 that Thompson arranged to have the cash transferred without explicit references to it, apparently in the forlorn hope that if any of his trusted conpanions ever appeared on a witness stand to accuse him, he could escape conviction by recounting how he had told the group that he did not want cash and had left the meeting without any money. The permissible, if not the irresistible, inference the jury could draw from the series of conversations on October 9 was that Thompson was not rejecting money; he was care-

fully orchestrating how to accept it with feigned innocence. The evidence supported a finding that Thompson and Criden, recognizing that those offering bribes understandably want some indication that the Congressman they have bought it aware of the purchase, worked out a scenario whereby Thompson would acknowledge receipt with only the oblique comment to Criden, "You look after that for me will you?" That formula, the jury could find, would surely satisfy the bribe-givers that Thompson was acknowledging receipt, while preserving his opportunity, if the occasion ever arose, to claim at a trial, as he did, that he thought the briefcase contained investment proposals.

[10] The transcription on October 20, which formed the basis for the substantive offenses of which both Thompson and Murphy were convicted, followed the same pattern Criden and Thompson had developed and used for the evening session on October 9. The evidence shows that

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Thompson and Criden had explained their ground rules to Murphy. A recorded telephone conversation between Criden and Weinberg on October 17 contained these passages:

"Weinberg: Now, you gonna lay those ground rules to Murph, right?

Criden: Oh yeah. No problem.

....

Criden: I am going to have lunch with this guy, with Murphy. And I am gonna make sure he understands clearly....

....

Criden: I've got to coach these guys. I've got to make them feel at ease.

....

Criden: I gotta stroke him, you know, uh, make him feel comfortable.

Weinberg: They all got that problem, they're nervous.

Criden: They're all nervous. You know they all figure that maybe it's set up, you know.

....

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Weinberg: Thompson must have spoken to him, huh.

Criden: Yeah, naturally."

The caution displayed by Thompson and Murphy permitted them a chance to confront the jury with a contestable question of fact. The jury, asked to determine the factual question of whether Thompson and Murphy knowingly took money while seeking to minimize the incriminating nature of their own words and conduct, saw through the ploy. Facing the legal issue of whether the investigators' bribe offer was unfairly obscured, we are equally unmoved. The agents did not violate due process limits by observing the defendants' ground rules.

Murphy further contends that there is a First Amendment dimension to the due process claim of deliberate creation of ambiguous facts. The ambiguities of what occurred on October 20, he suggests, blur the line that must be maintained between unlawful conduct that violates

criminal statutes and lawful conduct, protected by the First Amendment, that occurs when a Congressman discusses legislative action and assistance with his constituents. Reliance is placed on cases such as **United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968),** and **United States v. Spock, 416 F.2d 165 (1st Cir. 1969).**

This First Amendment claim is untenable. Unlike **O'Brien,** there is no issue in these appeals whether conduct arguably protected by the First Amendment as expression is nonetheless being punished. "[I]t is **taking** the bribe [or an unlawful gratuity], not performance of the illicit compact, that is a criminal act." **United States v. Brewster, supra 408 U.S. at 526, 92 S. Ct. at 2544 (emphasis original).** Nor do these appeals present the issue, illustrated by **Spock,** whether a lawful objective was pursued by lawful or unlawful means. **See United States v. Spock, supra, 416 F.2d at 169.** In some circumstances a

prosecution of a Congressman for bribery can present a close question as to whether money was received as an illegal bribe or a lawful campaign contribution; in such cases, the jury must be carefully instructed as to the distinction, and the evidence must show "specific knowledge of a definite official act" for which payment is made. **United States v. Brewster, supra, 506 F.2d at 81.** But none of these Congressmen claimed that he had received what he thought was a campaign contribution.[20] Murphy's point is that, at least in his case, there was an undue risk that the jury might convict him simply for engaging in the normal congressional activities of meeting with people who might invest in his district and advising people on immigration matters. That risk

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20. Though Lederer was quoted by Cook as saying he would be satisfied with only a $5,000 campaign contribution from his lawyer friends out of the $50,000 payment, he made no claim at trial that he thought the sheik's representatives were making a donation to his campaign. His sole defense was entrapment.

was adequately met by Judge Pratt's instructions, which focused the jury's attention squarely on whether Murphy knew that there was money inside the briefcase transferred on October 20 and whether Murphy received that money. The First Amendment claim cannot obscure the fact that Murphy accepted Thompson's invitation to accept money unlawfully under an arrangement that they both mistakenly believed would yield insufficient evidence of their guilt. The risk of a mistaken conviction is adequately protected by scrutinizing the sufficiency of the evidence on which a jury is permitted to find guilt beyond a reasonable doubt.

2. **Conduct of the Investigation.** Appellants' remaining challenges to the accuracy of the Government's proof require little discussion. They voice a chorus of indignation that the Government would employ the services of such an untrustworthy person as Weinberg, and they fault the FBI agents and prosecutors for not subjecting

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Weinberg to more exacting supervision and for compensating him too generously. They challenge Weinberg's failure to record all of his conversations with all of the defendants and his loss and erasure of some audio tapes. They urge that in various respects the entire investigation failed to conform to internal guidelines of the Department of Justice promulgated by former Attorney General Edward Levi.

[11] The use of dishonest and deceitful informants like Weinberg creates risks to which the attention of juries must be forcefully called, but the Due Process Clause does not forbid their employment, detail their supervision, nor specify their compensation. Weinberg's rewards, both in cash and in lenient treatment for his 1977 fraud conviction, were fully explored with the jury. Though the appellants claimed that he was induced to lie by offers of contingent payments for making cases, the District Court found no such arrangement. 527 F. Supp. at 1240. No doubt

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Weinberg did not record every conversation with every defendant, but hundreds of audiotapes were made, in addition to the videotaping of all the meetings with ther Congressmen. Despite the appellants' dark insinuations, the evidence fully justified Judge Pratt's findings that on one occasion a few audiotapes were stolen from Weinberg's flight bag and on other occasions, Weinberg recorded over and thereby erased previously taped conversations that were unimportant. **Id. at 1231.** There was conflicting evidence, considered by the jury, as to whether on another occasion a tape gap was the result of accident, as Weinberg claimed, or deliberate manipulation, as a defense witness claimed. In no instance can defendants point to any unrecorded conversation or portion of a conversation that would have added anything of significance to their defenses. Non-compliance with internal departmental guidelines is not a ground for complaint. **United States v. Caceres, 440 U.S. 741, 99 S. Ct. 1465,**

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59 L.Ed.2d 733 (1979).

3. **Brady Claims.** Appellants contend that various items were not disclosed to them until after the completion of the jury trials, items that they claim were exculpatory and required to be disclosed under the rule of **Brady v. Maryland, supra.** Many of the claims concern items that would allegedly have bolstered the attack upon the credibility of Weinberg. Judge Pratt properly placed these claims in perspective when he noted the abundant grounds available to the defendants at trial to impeach Weinberg's credibility:

"Weinberg admitted that he had been a criminal most of his life, that he had made his living by being a con man, that he had lied and cheated and violated the law from his early teenage years, that he was a convicted felon, that he had made a deal with the government to cooperate in return for probation on his felony conviction in Pittsburgh, and that he had received substantial compensation for his cooperation in

the Abscam investigation and trials."

527 F. Supp. at 1248.

In any event, the claims are without merit. Criden points to evidence he contends would have buttressed his claim that Weinberg had received and had falsely denied receiving a $350 microwave oven and other gifts from Errichetti. The prosecution had sought to support Weinberg's credibility with evidence that he had promptly turned over to FBI agents three $6,000 gold watches given him by George Katz, a defendant in another Abscam case. At the Myers trial, Weinberg testified that he told the agents about the watches after he received them. What Criden now complains of is the late disclosure of a memorandum indicating that Weinberg had told the agents about the watches even prior to his receipt of them. Whenever he mentioned them, the Government's point remains that Weinberg was not likely to conceal a $350 gift when he had been forthcoming about an $18,000 gift. Lederer com-

plains that not until after his trial did he obtain the transcript of the August 9, 1979, "coaching" session involving Weinberg and Senator Williams and other documents revealing criticism by the New Jersey prosecutors of Weinberg's tactics. In fact, Lederer did receive, prior to trial, a lengthy memorandum in which a senior Department of Justice official summarized the criticism from the New Jersey prosecutors and much of the basis for their criticism. Armed with this memorandum, Lederer called two New Jersey prosecutors as defense witnesses to testify about the August 9 session. Moreover, Lederer's defense was entrapment, not "playacting." Thompson claims he could have bolstered his attack on Weinberg's credibility if he had been given Weinberg's testimony at the "due process" hearing in Philadelphia before Judge Fulton in which Weinberg falsely denied having been cautioned, after the August 9 session, not to coach potential defendants. The falsity of this denial was not relevant to any testimony

Weinberg gave at Thompson's trial. Thompson made no claim that he had been "coached" into making false promises to help the sheik. Moreover, like all the defendants, he had abundant grounds on which to attack Weinberg's credibility. None of these claims, nor any of the other alleged **Brady** violations, which we do not detail, remotely provides a basis for any relief.

* * * * * *

[12] Having considered all of appellants' claims that the investigation violated the standards of the Due Process Clause, we conclude that the conduct of the Abscam operation did not deny any appellant a constitutionally protected right.[21] Appellants contend, nevertheless, that

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21. Some of the appellants contend that venue was improperly laid in the Eastern District of New York. They acknowledge that significant events occurred in that District, notably the payments to Myers, Lederer, and Murphy, the last of which was shared with Thompson. The claim is that venue was "manufactured" in the Eastern District for ulterior reasons, primarily to enable the Eastern District prosecutors to handle the trials. In **United States v. Archer, 486 F.2d 670 (2nd Cir. 1973)**, we rejected the Government's

(footnote cont'd)

we should assess the conduct of the government agents under more exacting standards than those of the Due Process Clause and dismiss the indictments in the exercise of our supervisory power over the administration of criminal justice. Whatever the scope of that authority in the aftermath of **United States v. Payner, 447 U.S. 727, 100 S. Ct. 2439, 65 L.Ed.2d 468 (1980)**, it does not permit courts to fashion their own "sub-constitutional" limitations of the conduct of law enforcement agents. Prior to **Payner**, the supervisory power was used to fashion and enforce rules for judicial proceedings in order to safeguard important constitutional rights. **See e.g., United**

(footnote cont'd)

attempt to create federal jurisdiction by luring a defendant into placing a telephone call across a state line. We do not preclude the possibility of similar concerns if a case should arise in which key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue. Here, the key events occurred in the Eastern District of New York, and the Government cannot be faulted for selecting hotels near Kennedy Airport as the site for transactions involving Congressmen from New York, New Jersey, and Pennsylvania.

States v. Mohabir, 624 F.2d 1140, 1151-53 (2d Cir. 1980) (right to counsel); United States v. Hinton, 543 F.2d 1002, 1010 (2d Cir.) (self-incrimination), cert. denied, 429 U.S. 980, 97 S. Ct. 493, 50 L.Ed.2d 589 (1976). And on infrequent occasions, the power was used to discipline prosecutorial irregularities, particularly in front of grand juries. See United States v. Jacobs, 531 F.2d 87 (2d Cir.), vacated mem., 429 U.S. 909, 97 S. Ct. 299, 50 L.Ed.2d 277, reinstated, 547 F.2d 772 (2d Cir. 1977), cert. dismissed, 436 U.S. 31, 98 S. Ct. 1873, 56 L.Ed.2d 53 (1978). It has not been used as a general corrective authority over the conduct of criminal investigations, and, in light of Payner, its scope is surely not to be expanded. Appellants are entitled to no more from the courts than a testing of Abscam against constitutional standards.

IV.

We consider next a series of claims that arise in one or another of the three trials.

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A. Myers Trial

[13] 1. Sufficiency of Evidence. Criden and Johanson both challenge the sufficiency of the evidence to establish that they knew the purpose for which the money was paid to Myers. The record shows their awareness at the early stages of the plan; their law partner, Cook, testified that after the meeting on the yacht, Criden and Johanson told him about the sheik's concern for asylum in the United States and that payment to Congressmen would assure a "friendly face" who "owed him a favor" and would "help" him. Criden's claimed assurance that the Congressmen would never have to do anything does not lessen his and Johanson's knowledge that the money was being corruptly received for a promise to be influenced concerning official action, whether or not the promise was intended to be kept. Criden's attendance at and participation in the January conversations with Myers in Philadelphia leave no doubt whatever of his knowledge. Johanson's

knowledge was fairly inferable by the jury from his initial hearing of the plan, his recruitment of Myers, his receipt of cash, and his acknowledgement to the FBI that he had had many sleepless nights but had not been able to resist the chance to make some easy money. This non-hearsay evidence of Johanson's culpability justified the admission against him of the acts and declarations of the co-conspirators. See United States v. Mastropieri, 685 F.2d 776, at 785-790 (2d Cir. 1982).

[14] 2. Evidentiary Ruling. The Myers appellants contend that it was error to admit into evidence the January, 1980 conversations that Myers and Criden had with undercover agents Wald and Haridopoulos at the Barclay Hotel in Philadelphia. In these conversations Myers demanded an additional $35,000 to bring his share up to the $50,000 he had expected to receive from the August 22, 1979, meeting; he also discussed possible investments by the sheik that would pro-

vide a justification for his assistance with immigration matters. Appellants contend that their conversations were evidence of other crimes occurring after the end of the conspiracy concerning the August 22 payment and were inadmissible under Fed. R. Evid. 404(b). The argument builds upon the ruling Judge Pratt made when the evidence was offered. Anxious to keep the jury's attention focused on the August 22 episode, Judge Pratt told the jury that the January conversations were "outside the conspiracy charged in the indictment" and should be considered as acts and statements "only against the defendant who made them." In fact, the conversations, illuminating the nature of the conspiracy and occurring while the conspiracy was still in existence, were fully admissible against all defendants. Judge Pratt's limiting instruction as he recognized, was unduly favorable to the defendants and affords them no basis to complain.

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[15-18] 3. **Jury Instructions.** Criden levels several attacks upon the charge in the **Myers** trial, none of which has merit. It was not error for the District Court to decide the appellants' due process claims, without submitting them to the jury. **United States v. Nunez-Rios, 622 F.2d 1093, 1098 (2d Cir. 1980).** In general observation in the portion of the charge concerning witness credibility, Judge Pratt told the jury that they may consider a witness's prior "failure to disclose information, when the opportunity to do so presented itself." Criden apprehends that the jury may have taken this as permission to draw an adverse inference from Myers' silence during the course of an interview with FBI agents. This portion of the charge was not directed at Myers, the jury was not told that Myers had exercised his right to remain silent during the interview, and in any event, Myers' failure to give his version of the facts was probative since he had elected to make statements to the agent be-

fore deciding to end the interview. See Anderson v. Charles, 447 U.S. 404, 100 S. Ct. 2180, 65 L.Ed.2d 222 (1980) (per curiam). It was not improper to refer to Weinberg as an "informer," and the charge adequately cautioned the jury concerning his testimony. Finally, it was surely not prejudicial error, if error at all, to omit the requested instruction that the jury may infer that tapes and unrecorded portions of tapes not produced by the Government would be unfavorable to the prosecution if the jury found that such tapes or portions "could" have contained pertinent material. The failure to record all conversations and all portions of taped conversations and the dispute concerning whether Weinberg had purposely erased two tapes of conversations with Errichetti were fully argued to the jury.

B. Lederer Trial

[19,20] 1. **Evidentiary Ruling.** Lederer contends that evidence was introduced at his trial in violation of the Speech or Debate Clause. He objects to the admission of his annual financial

disclosure statement, filed with the Clerk of the House of Representatives pursuant to the Ethics in Government Act of 1978, 2 U.S.C. §701 et seq (Supp. IV 1980). In that statement Lederer falsely listed his $5,000 share of the bribe as a "consulting fee" from Johanson. The financial report was not shielded by the Speech or Debate Clause. Though the Clause, in covering "legislative acts," Gravel v. United States, 408 U.S. 606, 625, 92 S. Ct. 2614, 2627, 33 L.Ed.2d 583 (1972), extends beyond words spoken during legislative debate, any other matters it reaches "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings...." Id. Disclosure of income from sources other than employment by the United States, see 2 U.S.C. §702(a)(1)(A), is no part of such "deliberative and communicative processes." Cf. Hutchinson v. Proxmire, 443 U.S. 111, 99 S. Ct. 2675, 61 L.Ed.2d 411 (1979) (newsletters and press re-

leases); United States ex rel. Hollander v. Clay, 420 F.Supp 853 (D.D.C. 1976) (Congressional travel vouchers). Prosecutions for falsification of similar statements indicate that Lederer's financial disclosure statement was not shielded. See United States v. Bramblett, 348 U.S. 503, 75 S. Ct. 504, 99 L.Ed. 594 (1955) (prosecution for false statement to House Disbursing Office); United States v. Diggs, 613 F.2d 988 (D.C. Cir. 1979) (prosecution for false statement to House Office of Finance), cert. denied, 446 U.S. 982, 100 S. Ct. 2961, 64 L.Ed.2d 838 (1980).

[21] 2. Jury Instructions. Lederer's two objections to the charge are without merit. It was not error for Judge Pratt to explain "predisposition" by asking the jury to determine whether the defendant was "ready and willing" to commit the crimes charged whenever a favorable opportunity arose. United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952). Lederer would have preferred an explanation that required finding a

"previous intent or purpose," as some courts have phrased the test, e.g., United States v. Karas, 624 F.2d 500, 503 n. 2 (4th Cir. 1980), cert. denied, 449 U.S. 1078, 101 S. Ct. 857, 66 L.Ed.2d 800 (1981). In this Circuit, the "ready and willing" phrase has been repeatedly used. E.g., United States v. Martinez-Carcano, 557 F.2d 966, 969-70 (2d Cir. 1977); United States v. Rosner, 485 F.2d 1213, 1222 nn. 11 & 12 (2d Cir. 1973), cert. denied, 417 U.S. 950, 94 S. Ct. 3080, 41 L.Ed.2d 672 (1974); United States v. Braver, 450 F.2d 799, 801 n. 4, 805 (2d Cir. 1971), cert. denied, 405 U.S. 1064, 92 S. Ct. 1493, 31 L.Ed.2d 794 (1972). The jury need not find that the defendant consciously considered committing the crime before the opportunity arose, only that he was predisposed to accept the opportunity presented to him, i.e., of a frame of mind that made him "ready and willing" to commit a crime, even on the first occasion that he may have considered it.

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[22] Nor was it improper to tell the jury, in the course of explaining that the defendant has no obligation to present any evidence, that a defendant has the power to subpoena witnesses. This phrase prompted no objection at trial, and cannot be raised on appeal. In any event, there is no merit to Lederer's suggestion that the jury might have mistakenly thought he could have called Errichetti, Criden and Johanson to support his entrapment claim. Having failed to subpoena his severed co-defendants, Lederer cannot assume that their testimony was not available to him. Cf. United States v. Wright, 588 F.2d 31, 36 (2d Cir. 1978) (failure to subpoena witness precludes claim that lack of use immunity for the witness created prejudice), cert. denied, 440 U.S. 917, 99 S. Ct. 1236, 59 L.Ed.2d 467 (1979).

C. Thompson-Murphy Trial

1. The "Impossibility" Defense. Thompson contends that the indictment against him fails to state an offense on the theory that the fictional

nature of the "sheiks" and their immigration problems renders the crime of bribery, as alleged in the indictment, impossible of performance. The "impossibility" defense has been a matter of conflicting views. Compare People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906) (defense upheld as to a "fence" who bought goods from a police informant that were not in fact stolen, and State v. Guffey, 262 S.W.2d 152 (Mo.App. 1953) (defense upheld as to a hunter who shot a stuffed deer placed as a decoy by a game warden), with People v. Rojas, 55 Cal.2d 252, 10 Cal.Rptr. 465, 358 F.2d 921 (1961) (rejecting defense as to a "fence" who bought goods not in fact stolen. Federal courts have upheld the defense when the crime charged had not in fact occurred, even though the defendant thought it had. E.g., United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976) (sale of uncontrolled substance incorrectly believed to be controlled substance); United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973) (transmittal of letters

to prison inmate correctly believed to be without warden's knowledge).

[23] The claim is unavailing here for the basic reason that the crime charged did occur. The indictment charged and the evidence established that Thompson received a bribe in return for his corrupt promise to take official action. That suffices to constitute a violation of § 201(c). United States v. Brewster, supra, 408 U.S. at 525-26, 92 S. Ct. at 2544. Whether the promise was carried out is irrelevant, id. at 527, 92 S. Ct. at 2544, and it is no defense that the promise could not have been carried out either because the official act to be taken was beyond the defendant's authority, United States v. Carson, 464 F.2d 424, 433 (2d Cir.), cert. denied, 409 U.S. 949, 93 S. Ct. 268, 34 L.Ed.2d 219 (1972); United States v. Heffler, 402 F.2d 924 (3d Cir. 1968), cert. denied, 394 U.S. 946, 89 S. Ct. 1280, 22 L.Ed.2d 480 (1969), or had already been taken, United States v. Arroyo, supra, 581 F.2d at 653-

57; cf. United States v. Rosner, supra, (18 U.S.C. §201(b), punishing the bribepayer, is violated whether or not purpose of the bribe is capable of attainment); United States v. Jacobs, 431 F.2d at 759 (same).[22] Neither is it a defense

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22. Thompson relies on United States v. Reisley, 35 F.Supp. 102 (D.N.J. 1940), in which Circuit Judge Maris, sitting in the District Court, upheld a defense to an indictment charging violation of 18 U.S.C. § 203 (1934), a conflict of interest statute that preceded 18 U.S.C. § 281 (1958) and 18 U.S.C. § 203 (1976). An employee of the Veterans Administration had received money for promising to effect an increase in the payor's benefits. In fact, the increase had already occurred without any action by the defendant. Reisley viewed the offense as accepting payment for services rendered, and acquitted the defendant since in fact services had not rendered. Even if that decision is correct as to a conflict of interest violation, its force as applied to a bribery violation is negated by the explicit Congressional recognition, expressed by the House Committee on the Judiciary when the current bribery statutes were revised in 1962, that "it is the purpose for which the recipient knows the bribe is offered or given when he solicits, receives, or agrees to receive it which is determinative of criminality." H. Rep. No. 748, 87th Cong., 1st Sess. 18 (1961). The House Report cited approvingly to Whitney v. United States, 99 F.2d 327, 331 (10th Cir. 1938), which had construed an early bribery statute, 18 U.S.C. §207 (1934), contrary to Reisley's view of a conflict of interest statute.

that the public official will not be called upon to take official action because of the ficticious nature of the person alleged to be seeking assistance. "Official act" is defined as action on any matter that "may at any time be pending" before a public official, 18 U.S.C. §201(a). Introducing a private immigration bill qualifies as an "official act," whether or not the beneficiary of such a bill is a real person. It was not necessary for the investigators to continue Abscam to the point of having bills introduced, conduct that would, in any event, have been immunized by the Speech or Debate Clause. See United States v. Johnson, 383 U.S. 169, 180, 86 S. Ct. 749, 755, 15 L.Ed.2d 681 (1966).

2(a). Jury Instructions--Element of Receipt. Thompson and Murphy both challenge portions of the jury instructions. One claim, applicable to all of the substantive counts, attack Judge Pratt's supplemental instruction, in response to a jury inquiry, concerning the element of receipt

of illegal payment. Understanding the claim requires some elaboration of the pertinent circumstances. The courts of the indictment charging violations of bribery, unlawful gratuity, and conflict of interest all alleged receipt of money between October 10, 1979, and February 2, 1980. The Government's theory of the Thompson-Murphy case was that the substantive offenses committed by both Thompson and Murphy arose out of the October 20 transaction involving Murphy and Criden, not the October 9 transaction involving Thompson and Criden. In its bill of particulars the Government alleged that the $50,000 cash payment "was received by Criden and Murphy on October 20, 1979....Criden left the meeting in physical possession of the money. The date on which and the place where Murphy took physical possession of his share of the payment is [sic] unknown." In charging the jury initially with respect to the "receipt" element of Count Two, the bribery offense, Judge Pratt focused the jury's

attention on the issue of whether either defendant had received a share of the $50,000 after the October 20 meeting: "It is for you to determine based on all of the evidence whether the Government has established beyond a reasonable doubt that the money in the briefcase transferred from Amoroso to Criden on October 20th was for the benefit of and eventually received by defendant Murphy and defendant Thompson of both." (Emphasis added.) The jury was told that this "receipt" element also applied to the unlawful gratuity and conflict of interest counts, and that a defendant who did not receive part of the money must be acquitted on all the substantive counts.

The jury's first inquiry of this issue read as follows:

"Your Honor, If this question is in order--

If the briefcase was under the control of but not in the physical possession of the defendant Murphy, does [sic] that, under your charge, be considered "for the benefit of an eventual

reception by defendant Murphy or defendant Thompson or both?["]"

Judge Pratt apparently thought that the jury mistakenly understood that Murphy's possession of the briefcase at the October 20 meeting was a required aspect of a finding of receipt by him. He therefore gave a supplemental instruction that included the following:

"In specific answer to your question, as I interpret it, actual possession of the briefcase itself by Murphy would not have to be shown before you could determine that he later received part of the money."

The correctness of this response is not challenged on appeal. It soon became apparent that the jury had not wondered whether Murphy's actual possession on October 20 was required; they were making the more trenchant inquiry as to whether his constructive possession on that date was sufficient. Their subsequent note read as follows:

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Your honor:

Some members of the jury feel it is possible that defendant Murphy took "direction & control" of the briefcase however momentarily by instructing Criden to take physical possession, making Criden the "executor" of the money in a sense at that point.

May we construe this to be in satisfaction of element one of Count 2 in lieu of "eventually["] receiving the money at some later time? [Emphasis original.]

This inquiry provoked an extended colloquy between Court and counsel. Murphy contended that the inquiry should be answered with a simple "no," arguing that any other response would unfairly alter the Government's theory of how the offense occurred. This concern was heightened when the prosecutor, in urging that the proper response was "yes," pointed out that the bribery statute is violated when a public official receives anything of value either "for himself or

for any other person of entity." Ultimately, Judge Pratt decided to steer a middle course, rejecting a "no" answer and also rejecting the Government's effort to permit the jury to convict Murphy on the theory that he was merely seeking to confer a benefit upon Criden. Instead, Judge Pratt kept the jury's attention focused on the crucial element of whether money was received by Murphy and for his benefit, but permitted the jury to consider whether receipt by Murphy was established by his words and conduct at the October 20 meeting. First he reminded the jury to focus on the essential element of count Two, which he summarized as being "that on or shortly after October 20, 1979, the defendant received a sum of money." He then endeavored to paraphrase the jury's inquiry and respond to it:

"When I said in the charge it is for you to determine based upon all the evidence whether the Government has established beyond a reasonable doubt that the money in the briefcase trans-

ferred from Amoroso to Criden on October 20th, was for the benefit and eventually received by the defendant Murphy, or defendant Thompson, or both, when I use the term 'eventually,' there did I really mean eventually and not then, October 20th[?]

And my answer to that is[:] you in applying this element to the defendant Murphy, you may disregard the term eventually. It is for you to evaluate what was said, what happened, what the circumstances were, and determine from that whether the defendant Murphy received the money. [Emphasis added.]"

Since the major factual dispute framed by Murphy's cross-examination and summation was whether Murphy had any knowledge that money was in the briefcase, Judge Pratt emphasized that the element of receipt could not be established unless the jury found that Murphy knew that money was in the briefcase. He then recapitulated his response in these words:

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"So my final answer to your question is:

If you are talking simply about the temporal aspect of this, the timing now as opposed to eventually, the answer is yes. You may construe those circumstances to be receipt of money on or shortly after October 20, 1979, as that set forth in the element one of Count 2."

Significantly, the only criticism voiced by counsel after hearing the supplemental instruction was to request that one sentence of the response might have been misunderstood as altering the Government's burden of proof as to knowledge. Judge Pratt promptly recalled the jury and re-emphasized, as he had when the inquiry was first answered, that the burden to prove Murphy's knowledge of the money beyond a reasonable doubt rested upon the Govenment.

[24] The supplemental instruction presents no ground on which either Murphy or Thompson may now complain.[23] Judge Pratt's response did

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23. Complaint is also made that Judge Pratt did (footnote cont'd)

not alter the requirement that the money be received for the benefit of the defendant.[24] Limiting

(footnote cont'd)

not adequately alert counsel to his proposed response before giving it to the jury. **See United States v. Ronder, 639 F.2d 931 (2d Cir. 1981).** Although Judge Pratt did not give counsel a verbatim version of his proposed response, he held an extended colloquy with counsel, afforded both sides an opportunity to suggest their preferred responses, then outlined, in summary fashion, the response he proposed to give, and thereafter allowed counsel to make further argument. There is no basis for procedural complaint, especially in view of the fact that counsel's remarks, after hearing what Judge Pratt proposed to do, questioned only the substance of the response and offered no suggestion that might improve its wording.

24. Murphy was acquitted on the bribery count and therefore challenges the supplemental instruction only as it may have affected the element of receipt for the unlawful gratuity and conflict of interest counts, the substantive counts on which he was convicted. Since we conclude that the supplemental instruction did not alter thr prosecution's obligation to prove that Murphy must be shown to have received the money for his benefit, we are willing to assume, for the sake of argument, that, though the jury's inquiry mentioned only Count Two, they understood the response also to apply to the receipt element of the counts charging an unlawful gratuity and a conflict of interest. In his initial charge, Judge Pratt had told the jury that the element of receipt as to bribery applied equally to the other substantive offenses. Section 201(g), punishing receipt of an unlawful gratuity, is limited to receipt by the

(footnote cont'd)

himself to the precise point raised by the jury, he broadened only the temporal aspect of receipt. He permitted a finding of receipt not only at some point after October 20 but also at the time of the October 20 meeting. This permitted the jury to find that Murphy had constructively received the money for himself on October 20 and had permitted Criden to take physical possession, presumably with the expectation that at some point Murphy would regain physical possession of a portion of the money, even if the occurrance of that last step was not found to have been esta-

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(footnote cont'd)

public official "for himself," and "for any other person or entity" as provided in section 201(c), punishing bribery. We are also willing to assume, for the sake of argument, that section 203(a), punishes conflict of interest, is limited to receipt of compensation by and for the public official, though this point is somewhat doubtful. **Cf. United States v. Shirey, 359 U.S. 255, 79 S. Ct. 746, 3 L.Ed.2d 789 (1959) (construing 18 U.S.C. §214 (1958) (now 18 U.S.C. §210 (1976)).**

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lished.[25] The jury wanted to know if receipt could be found to have occurred on October 20, and Judge Pratt correctly told them that it could. Since the principally disputed issue as to Murphy was whether he knew there was any money in the briefcase on October 20, it is difficult to see how the defense would have acted differently if it had been specifically alerted to a theory of receipt on October 20, a theory that, in any event, was comprehended by the bill of particulars. In arguing the point on

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25. Early in the colloquy with counsel, Judge Pratt had suggested that it would be "kind of a far-out view" if the jury thought that on October 20, Murphy "really didn't accept [the money] for his own benefit" and was "giving it up to Howard Criden with no further claims on it." On appeal counsel dwell on this characterization, overlooking the fact that the supplemental instruction that Judge Pratt decided to give did not permit the jury to abandon the requirement that Murphy must receive the money for his own benefit.

appeal, Murphy makes no showing of any prejudice from the supplemental instruction. Thompson likewise offers no theory of prejudice as to him. The jury's question and the Court's response both related explicitly to Murphy, leaving unvaried in any respect the initial instruction that the jury must find Thompson to have received his share of the October 20 payment sometime after the meeting.

[25] Murphy contends that the instruction permitted the jury to find receipt on a theory of constructive possession without adequate guidance as to the standards governing that concept. That complaint cannot be made now. Counsel had ample opportunity after hearing both the substance of Judge Pratt's proposed response and the delivery of the response to suggest additional language explicating constructive possession. If the jury's approximation of the concept evident from the test of their inquiry required refinement, the opportunity for amplification was available

to the defendants both before and after the instruction was given. This is not the first time that a jury's question has insightfully gone to the heart of a matter. Judge Pratt's handling of the episode was admirable under the circumstances.

2(b). Jury Instructions--the Section 203(a) Offense. Murphy challenges the jury instruction concerning the elements of Count Three, the so-called conflict of interest offense, 18 U.S.C. § 203(a). His principal point is that section 203(a) proscribes receipt of payment for rendering only "representational" services before government agencies, whereas the District Court's instruction permitted the jury to find a violation for rendering services of a broader nature including merely giving advice.[26] The claim requires consideration

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26. Murphy also contends that the charge was deficient in not specifying as an element of the offense that the proceeding in relation to which services are rendered be pending before a governmental forum. However, the statute contains no requirement of a proceedings pending at the time compensation is received. **United States v.**

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of the structure of the text of section 203(a), which reads as follows:

> Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another--
>
> (1) at a time when he is a Member of Congress, Member of Congress Elect, Delegate from the District of Columbia, Delegate Elect from the District of Columbia, Resident Commissioner, or Resident Commissioner Elect; or
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> (2) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States,

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Evans, 572 F.2d 455, 481 (5th Cir.), cert. denied, 439 U.S. 870, 99 S. Ct. 200, 58 L.Ed.2d 182 (1978); United States v. Johnson, 337 F.2d 180, 196 (4th Cir. 1964), aff'd, 383 U.S. 169, 86 S. Ct. 749, 15 L.Ed.2d 681 (1966).

including the District of Columbia, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a part or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission, [shall be punished].

From the standpoint of grammar, the issue is whether the phrase "before any department, agency, court-martial, officer, or any civil, military, or naval commission" modifies the category of covered proceedings or the category of covered services. The placement of the "before" phrase adjacent to the category of covered proceedings is some indication that only the immediately preceding category was intended to be modified. But this structural point is not so compelling as to preclude examination of legislative history. The Report of the Senate Committee on the Judiciary

describes the predecessor statute, 18 U.S.C. §281 (1958), as prohibiting Members of Congress and officers and employees of the Government "from receiving compensation for services rendered for others before a Federal department or agency in matters in which the Government is a party or is interested." S. Rep. 2213, 87 Cong., 2d Sess. 9, reprinted in 1962 U.S. Code Cong. & Ad. News 3852, 3858. In section 281 the "before" phrase had appeared in the same position as it does in section 203(a), yet the drafters of the Senate Report apparently thought the phrase modified the services rendered. The Report points out the section 203(a) continues the restraint of the prior section "in full effect" with one exception not here pertinent. Id. The Report of the House Committee on the Judiciary contains two references to our problem; unhappily each points in a different direction. The summary of provisions, like the Senate Report, describes the predecessor statute, section 281, as prohibiting receipt of

compensation "for services rendered before Federal agencies" in matters in which the United States has an interest. H. Rep. No. 748, 87th Cong., 1st Sess. 9 (1961). However, the section-by-section analysis describes former section 281 as prohibiting receipt of compensation "for services in relation to any matter in which the United States is interested and which is before any Government agency." Id. at 19. Our uncertainty remains.

Fortunately, section 203(a)'s statutory genealogy provides significant clues to its meaning. In 1864, Civil War scandals involving corrupt use of influence prompted Congress to pass section 203(a)'s earliest predecessor, a statute barring Members of Congress and federal employees from receiving compensation for rendering services in governmental proceedings before federal departments, agencies, military commissions. Act of June 11, 1864, ch. 119, 13 Stat. 123.[27] Although

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27. See Ass'n of the Bar of the City of New York, Conflict of Interest and Federal Service 40 (1960).

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the language of this early statute shares the grammatical ambiguity of current section 203(a), the legislative debate that surrounded its passage reveals that Congress was primarily concerned with government officials' being paid to bring their influence to bear on federal agencies. According to Senator Trumbull, Chairman of the Senate Judiciary Committee, the Statute was designed "to prevent Representatives and Senators

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The original statute read as follows:

> [N]o member of the Senate or House of Representatives shall, after his election and during his continuance in office, nor shall any head of a department, head of a bureau, clerk, or any other officer of the government receive or agree to receive any compensation whatsoever, directly or indirectly, for any services rendered, or to be rendered, after the passage of this act, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever.

The statute was recodified in esentially the same form in R.S. §1782 (1873). Later it was modestly revised and amended by Act of Mar. 4, 1909, ch. 321. §113, 35 Stat. 1088, 1109. Afterwards, it was recodified at 18 U.S.C. §203 (1926) where it

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in Congress and officers of the government who are paid for their services from receiving a compensation for advocating claims in the Departments and before the bureaus of Government." Cong. Globe, 38th Cong., 1st Sess. 561 (1864).

In interpreting the more recent predecessors of section 203(a), modern courts and commentators have agreed that an essential element of the offense is some appearance before, or at least contact with, a federal department by the accused official. In United States v. Adams, 115 F.Supp. 731, 735 (D.N.D. 1953), appeal dismissed, 209 F.2d 954 (8th Cir. 1954), a District Court dismissed an indictment based on 18 U.S.C. §281 (1952), section 203(a)'s most recent predecessor, because the indictment failed to allege that the defendant's services were to be rendered before a federal department. Accord United States v.

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remained until the 1948 revision of the federal criminal laws placed it, along with some minor amendments, at 18 U.S.C. §281 (1952).

Waldin, 122 F.Supp. 903, 904 (E.D. Pa. 1954).[28]

A review of the legislative history and cases has led a knowledgeable commentator in this area to

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28. In most of the cases interpreting section 203(a), the defendants had actually rendered services before a federal agency. See, e.g., Burton v. United States, 202 U.S. 344, 26 S. Ct. 688, 50 L.Ed. 1057 (1906); May v. United States, 175 F.2d 994 (D.C. Cir.), cert. denied, 338 U.S. 830, 70 S. Ct. 58, 94 L.Ed. 505 (1949); United States v. Johnson, 419 F.2d 56 (4th Cir. 1969), cert. denied, 397 U.S. 1010, 90 S. Ct. 1235, 25 L.Ed.2d 423 (1970). It is of interest, though not decisive, that some of these decisions describe the statute as prohibiting the rendering of services before a federal department. In Burton, the Supreme Court, upholding the constitutionality of R.S. §1782 (1873), a predecessor of section 203(a), referred to the authority of Congress to make it an offense for a Senator to receive compensation "for services to be rendered or rendered to any person, before a department of the government, in relation to a proceeding" in which the United States has an interest. 202 U.S. at 365; See also United States v. Johnson, 215 F.Supp. 300, 316 (D. Md. 1963) ("The words 'before any department, agency,' etc. refer to where the services have been rendered or are to be rendered, not where the proceeding or other matter is pending."), aff'd on other grounds, 337 F.2d 180, 196 (4th Cir. 1964), aff'd, 383 U.S. 169, 86 S. Ct. 749, 15 L.Ed.2d 681 (1966); United States v. Booth, 148 F. 112, 119 (C.C.D. Or. 1906) ("the service must be performed, 'before any department [etc.]'").

conclude that under section 203(a), and all its predecessors, "criminal penalty attaches to a government employee's compensated services it, and only it, the services are performed in particular designated forums." B. Manning, **Federal Conflict of Interest Law 55 (1964).** This background suggests that section 203(a) should be limited to services rendered before federal agencies-- the mischief toward which the statute was directed-- and not mere advice concerning agency proceedings.

A further consideration favoring this construction is the hazzards created by a broader interpretation. Since a Member of Congress is entitled to appeal before courts, even on matters in which the United States has an interest, **see, e.g., United States v. Waldin, supra; United States v. Quinn, 111 F.Supp. 870 (E.D.N.Y. 1953),** he may encounter a situation where a matter concerning his client merits court challenge but requires prior exhaustion of administrative remedies.

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Unquestionably the Member would be barred by section 203(a) from handling the matter before the administrative agency, and some courts apparently believe that section 203(a) prevents a government official from plea-bargaining with the Justice Department when the official is representing a criminal defendant. See Chudoff v. McGranery, 179 F.2d 869 (3d Cir. 1950). But see United States v. Johnson, 215 F.Supp. 300, 315 (D. Md. 1963), aff'd on other grounds, 337 F.2d 180 (4th Cir. 1964), aff'd, 383 U.S. 169, 86 S. Ct. 749, 15 L.Ed.2d 681 (1966). But, under the Government's view in the instant appeal, a federal official would also violate section 203(a) if the official, in the course of counseling his client, advised him to obtain additional counsel for representation before a federal department or agency. It seems unlikely that Congress, having framed section 203(a) to allow Members of Congress to represent clients in court, intended the statute to reach so far as to raise the prospect of a crimi-

nal violation when the lawyer-legislator counsels his client.

The Government suggests that a broad reading of section 203(a) is supported by a comparison of its terms with those of 18 U.S.C. § 205, set out in the margin, [29] which explicitly covers

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29. Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his duties--

(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claims, or

(2) acts as agent or attorney for anyone before any department, agency, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest--Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 205 (1976). Section 205(1)'s earliest statutory forebear was enacted in 1853. It read:

[A]ny officer of the United States, or person holding any place of trust or profit, or discharging any official function under, or in

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connection with, any executive department of the Government of the United States, or under the Senate or House of Representatives of the United States, who, after the passage of this act, shall act as an agent or attorney for prosecuting any claim against the United States, or shall in any manner, or by any means, otherwise than in the discharge of his proper official duties, aid or assist in the prosecution or support of any such claim or claims, or shall receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be liable to indictment, as for a misdemeanor, in any court of the United States having jurisdiction thereof, and, on conviction, shall pay a fine not exceeding five thousand dollars, or suffer imprisonment in the penitentiary not exceeding one year, or both, as the court in its discretion shall adjudge.

Act of Feb. 26, 1953 ch. 81 § 2, 10 Stat. 170. This statute was recodified in essentially the same form in R.S. § 5498 (1873). Later, it was amended by Act of Mar. 1, 1901, ch. 670, § 1, 31 Stat. 844, and Act of Mar. 4, 1909, ch. 321, § 108, 35 Stat. 1088, 1107-08. Afterwards, it was recodified at 18 U.S.C. § 198 (1926), recodified again at 18 U.S.C. §§ 198, 198a (1934), and amended once more by the 1948 revision of the federal criminal laws. Finally, it was codified at 18 U.S.C. 283 (1952).

This statute was most recently revised in 1962. Act of Oct. 23, 1962, Pub. L. 87-849, § 1(a), 76 Stat. 1122. The verbosity of previous versions was eliminated, and section 205(2) was added.

representational activities. Section 205 applies only to officers or employees of the United States and not to Members of Congress. It covers the the identical category of proceedings described in section 203(a). Its list of forums is similar to that in section 203(a) with the notable addition of "courts." [30] But section 205 differs markedly from section 203(a) in two respects. First, section 205 prohibits conduct whether or not performed for compensation, whereas section 203(a) prohibits only conduct rendered for compensation. Second, and central to the Government's argument, section 205 prohibits an official from acting "as agent or attorney for anyone," whereas section 203(a) prohibits rendering "any services." From this latter difference the Government argues that Congress intended section 203(a) to proscribe a

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30. The combined effect of omitting Members of Congress from section 205 amd omitting courts from the forums listed in section 203(a), which applies to Members of Congress, permits Members of Congress to appear before courts.

wider range of services than the representational services proscribed by section 205. The argument has some force, but is not decisive. Even as to officers or employees of the United States, who are covered by both statutes, the conduct proscribed by section 203(a) could be limited to services rendered before federal agencies, without completely duplicating the prohibition of section 205. Section 203(a) would then cover any contact made with an agency, whether or not the official was acting as agent or attorney, as specified in section 205.

The legislative history of section 205 undermines the Government's claim of a clearcut distinction between sections 205 and 203(a). A House Report accompanying the 1962 revision of the federal conflict of interest laws states that the purpose of section 205 is to prevent federal employees "from using actual or supposed influence in support of private causes." H.R. Rep. No. 748, 87th Cong., 1st Sess. 21 (1961). The

Report recognized that "section 281 [now section 203(a)] prohibits conduct of this nature when compensated," but added that "it is important that this type of representative activity be prohibited when it is not compensated." Id. (emphasis added). This suggests, contrary to the Government's contention, that the conduct prohibited by sections 203(a) and 205, both of which apply to federal employees, is similar. Both involve using actual or supposed influence, with section 205, but not section 203(a), requiring a formal representational role. As pointed out in a Justice Department memorandum of which Congress has taken note, "[W]hile section 203 is controlling as to Members of Congress, for all practical purposes section 205 completely overshadows section 203 in respect of officers and employees of the Government."[31] Memorandum of Attorney General-Standards

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31. Significantly, this memorandum describes section 203(a) as prohibiting Members of Congress and government employees from receiving compensation "for services rendered on behalf of another person before a Government department." 18 U.S.C.

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of Ethical Conduct for Government Officers and Employees, Exec. Order No. 11,222 (1965), reprinted in 18 U.S.C. §201 note, at 1025-32 (1976). If section 205 in fact largely duplicates section 203(a), as applied to federal employees, the Government cannot now argue that the two sections have two entirely distinct purposes.

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§ 201 note, at 1028.

The parties call our attention to other views previously expressed by the Department of Justice, of which Congress has taken note. Murphy cites a Senate Judiciary Report that includes the following: "The Department of Justice has, however, followed the more restrictive interpretation that the services rendered for compensation by the public servant must be representational in nature and not merely in the form of advice or assistance in writing contracts and the like." **Criminal Code Reform Act of 1977: Report of the Senate Judiciary Comm., S. Rep. No. 95-605, 95th Cong., 1st Sess. pt. 1, at 403 (1977).** The Government cites the following statement, submitted by the Department of Justice to a House Judiciary Subcommittee: "[A]ny utilization of official position to serve a private client, whether to influence the action of others or not, seems within the ban of the statute." Memorandum of the Office of Legal Counsel for the Attorney General (Dec. 10, 1956), reprinted in **Federal Conflict of Interest Legislation: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 86th Cong., 2d Sess., ser. 17, pt. 2, at 645-46 (1960).**

[26] The Government finally contends that section 203(a) should be broadly read to make sure that Members of Congress do not receive any extra compensation for rendering advice on governmental matters, advice that falls within their obligations to their constituents and the public generally. If Congress were to legislate that broadly, it would have to clarify the line between permissible legal practice and illegal advice on governmental matters.[32] Under all the circumstances, though we cannot be certain what Congress had in mind in the original enactment of 1864 or the revision in 1962, we think it sounder to construe section 203(a) to reach only services performed or to be

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32. To a considerable extent, the Government's concern that Members of Congress should not be permitted to accept extra compensation for performing their duties is met by the provisions of the unlawful gratuity statute, 18 U.S.C. §201(g) (1976), which formed the basis for Murphy's conviction on Count Five. Though that statute is broad in scope, it is limited to receipt of payment because of "any official act" performed, to to be performed, and does not extend to the giving of advice, which the Government would include under §203(a).

performed before the federal forums listed in the statute.

This interpretation, however, is not quite as limited as the "representational" role urged by Murphy. It includes, in the words of the statute, "any services...in relation to" the proceedings listed in the statute so long as the services are compensated and are rendered "before" the listed forums, whether or not the Member of Congress formally appears as attorney or agent. And, of course, informal contacts, as well as formal appearances, are proscribed.

[27] In the **Thompson-Murphy** trial, Judge Pratt, over the objection of Murphy,[33] gave the

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33. The Government contends that Murphy waived objection to the charge by not objecting after its delivery to the jury, as required by Fed. R. Crim. P. 30. However, Murphy submitted a proposed instruction on section 203(a), which limited the prohibited services to "interceding" with federal agencies and made clear that advising a person to seek the advice of attorneys is not improper. "Interceding" may connote in some minds a more direct action than the rendering of "any " services "before" a federal forum "in relation to" a proceeding in which the United States

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jury a broad definition of the "services" element of a violation of section 203(a). Rather than limit the term "services" to those to be performed "before" a federal agency, as we construe the statute to require, he told the jury that the term could include "a wide variety of services such as giving advice about [i]mmigration, how to delay deportation, how to improve one's chances of remaining in the country...." The summation on behalf of Murphy had argued, based on some of the phrases he used at the October 20 meeting,

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has an insterest. Nevertheless, the proposed instruction, if not precisely correct, sufficiently alerted the District Court to Murphy's well-taken point that giving advice is outside the reach of the statute. Normally, the submission of a requested instruction is not sufficient to preserve for appeal complaint that the charge as given failed to include it, see United States v. Fountain, 642 F.2d 1083, 1095 (7th Cir.), cert. denied, 451 U.S. 993, 101 S. Ct. 2335, 68 L.Ed.2d 854 (1981), but in this case, Judge Pratt informed counsel after considering and ruling upon requested instructions at a charge conference, that their objections voiced at that time would suffice to preserve issues for appeal, in lieu of renewing claims for such instructions after the jury charge. In that circumstance, the pre-charge objection to the denial of the requested instruction satisfied Rule 30.

that he was only advising the sheik's representatives to consult with Criden, who would handle legal matters concerning immigration problems. Since the charge erroneously permitted the jury to convict on Count Three by considering this type of advice to be covered by section 203(a), the conviction on that count must be reversed. However, since the evidence was sufficient to permit a finding that Murphy had in fact accepted money for services to be rendered before federal agencies or departments on immigration matters, the Government is entitled to prosecute the section 203(a) charge anew, if it is so advised.

[28] 3. **Sufficiency of Evidence.** Thompson challenges the sufficiency of the evidence against him, contending that the evidence failed to show that he received a portion of the $50,000 transferred at the October 20 meeting with Murphy and Criden and failed to show that he agreed to take any official action. However, Cook testified that Criden told him about delivering Thompson's

share to the Congressman at a coffee shop shortly after October 20. Thompson's meeting with Criden at the time and place Criden had mentioned to Cook was corroborated by eyewitness testimony. The jury was entitled to infer from the October 9 transaction with Thompson and Criden that Criden's report to Cook was credible. Thompson's agreement to take official action on immigration matters is fully established by his statements made at the morning meeting on October 9, the meaning of which is amplified by his statement to Congressman Murtha that "all we have to do is help these two Arabs get into the country perhaps sometime in the future."

[29] Murphy's challenge to the sufficiency of the evidence claims that the prosecution did not prove his receipt of money for his benefit. The Government maintains that the evidence showed receipt by Murphy both at the October 20 meeting when the briefcase containing $50,000 was handed to Criden and at some point thereafter when

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Murphy obtained physical possession of his share of the $50,000. We confine our attention to the October 20 meeting, which is apparently what the jury did, judging from their inquiry concerning constructive possession. In the context of the events that preceded that meeting, the episode could fairly be viewed by the jury as satisfying the receipt element of both of the substantive counts on which Murphy was convicted, unlawful gratuity and conflict of interest.[34] Criden and Thompson had developed an arrangement whereby money would be transferred by the sheik's representative without the necessity for Thompson phy-

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34. As previously indicated, **supra** note 24, we are willing to assume, for the sake of argument, that both section 201(g) and section 203(a) require not only receipt of money but also receipt for the benefit of the Defendant. In his initial instruction to the jury, Judge Pratt had explained that the "receipt" element of the bribery offense, section 201(c), required receipt for the benefit of the defendant and then stated, "This is a common element, either directly or indirectly,...in all of the substantive counts."

sically to handle the briefcase in the presence of Amoroso and Weinberg. Using guarded conversation, Thompson and Criden would say only enough to satisfy the sheik's representatives that Thompson was acknowledging receipt of money. The arrangement, carried out on the evening of October 9, ended with Amoroso indicating the briefcase and Thompson saying to Criden, "You look after that for me will you?" Thompson then recruited Murphy, and the jury was entitled to infer, from the sequence of events and what they saw on videotape, that at the October 20 meeting Criden and Murphy were following the same arrangement previously employed by Criden and Thompson. There was just enough conversation about money to reassure the sheik's representatives that Murphy was acknowledging his awareness of a payment. Amoroso then moved the briefcase toward the couch where Murphy and Criden were seated, Criden said, "Why don't you give that to Jack?", and Murphy replied, "Howard why don't you take

care of that."

This evidence entitled the jury to find that Murphy had at that point received the money. Having struck an agreement to accept money in return for assistance with the immigration matter,[35] Murphy was in constructive possession of the money in the briefcase when he exercised the authority to direct that Criden should take physical possession of it. An illegal payment is sufficiently received when the person who has agreed to receive it directs that it be held by his "bag man."[36] The evidence also permitted the jury to

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35. Though the jury was apparently not sufficiently persuaded that Murphy had agreed to take official action to convict him of bribery, they were entitled to use his statements indicating agreement as evidence of the context in which the handling of the briefcase was to be assessed for purposes of determining receipt.

36. The Government correctly points out that simply an agreement to receive money, rather than actual receipt, would violate section 201(g) and section 203. However, Judge Pratt instructed the jury that receipt was required.

find that Murphy received the money for his own benefit. The contrary inference, that he was agreeing to use his congressional influence in order to confer a benefit solely upon Criden, is utterly implausible.

[30] 4. Evidentiary Rulings. Thompson contends that the videotaping of his conversations with the undercover agents violated rights protected by the Fourth Amendment and, because he was a Congressman, also violated the First Amendment and the doctrine of separation of powers. The claim was not asserted at trial by a timely motion to suppress, see United States v. Mauro, 507 F.2d 802 (2d Cir. 1974), cert. denied, 420 U.S. 991, 95 S. Ct. 1426, 43 L.Ed.2d 672 (1975), and, in any event, is without merit. Thompson's conversations with undercover agents in whom he chose to confide were not privileged, and mechanical recordings of the sights and sounds to which the agents could have testified were proper evidence. See United States v. White,

401 U.S. 745, 749-53, 91 S. Ct. 1122, 1124-26, 28 L.Ed.2d 453 (1971); Lopez v. United States, 373 U.S. 427, 437-40, 83 S. Ct. 1381, 1387-1388, 10 L.Ed.2d 462 (1963); 18 U.S.C. §2511(2)(c). Since the tapes contained material evidence of criminal violations, they were not immunized by the circumstances that Thompson was a Congressman at the time the conversations occurred. Cf. United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L.Ed.2d 1039 (1974).

[31,32] Thompson claims that the Speech or Debate Clause bars the introduction into evidence of his private conversations with Congressman Murtha on the floor of the House of Representatives, in which he invited Murtha to join the ranks of those accepting bribes. One would think that a Congressman, even with grasping for objections to a criminal conviction, would understand that the Speech or Debate Clause accords immunity to what is said on the House floor in the course of the legislative process, Gravel v.

United States, supra, not to whispered solicitations to commit a crime.

Conclusion

In considering the myriad issues raised by these seven appellants, we are not passing judgment on the wisdom of the Abscam investigation, nor on whether the means by which it was conducted conformed to internal administrative standards of the Department of Justice or to other standards that the Executive Branch might choose to adopt or the Legislative Branch might require. Our task is to determine whether the methods employed and the conduct of the ensuing trials render the resulting convictions invalid under the Constitution and laws of the United States or whether they present one of those rare occasions when we are authorized to vacate convictions in the exercise of a limited supervisory power over the administration of federal criminal justice.

The four Congressmen were caught on videotape in the very act of committing federal

crimes. There was sufficient evidence of their guilt and that of the other defendants. The conduct of the investigation, though subject to some criticism, affords no basis for rejecting the convictions. The pretrial proceedings conducted by Judge Mishler and the trial and post-trial hearings conducted by Judge Pratt were vigorous contests marked throughout by the fairness, patience, and thoroughness of the District Judges. We have carefully considered all of the appellants' claims, including those not discussed in this opinion, and, with the exception of the attack upon the charge as to section 203(a) in the **Thompson-Murphy** trial, we find them all to be without merit, both for the reasons we have set forth and for the further reasons detailed in Judge Pratt's comprehensive opinion denying post-trial motions in the District Court. 527 F.Supp. 1206. We reverse only the conviction of John Murphy on Count Three of the indictment in No. 81-1346,[37] which we remand for

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37. The practical consequence is to reduce Murphy's aggregate fine from $20,000 to 10,000.

a new trial, and in all other respects all the judgments appealed from are affirmed.

On Petition for Rehearing

On petition for rehearing, Thompson contends, among other things, that the words he spoke to Criden at the evening meeting at the W Street house on October 9, 1979, were "You look at that for me will you?" and not "You look after that for me will you?" as reflected in the panel's opinion and in the Government's version of the videotape transcript given to the jury. At the request of Thompson's counsel we viewed the videotape of this meeting. After viewing and hearing the videotape we cannot be certain whether the disputed word was "at" or "after." If we give the defendant the benefit of the doubt, this would surely have aided his argument to the jury that he thought the briefcase transferred at the meeting contained investment documents (to be looked at) rather than money (to be looked after). But this interpretation of the videotape would not

alter the sufficiency of the evidence on which the jury convicted nor our assessment of the investigation for purposes of rejecting the due process challenges.

On the contrary, viewing the videotape reenforces our conclusion that the events at the evening meeting on October 9 reflect a contrived arrangement whereby $50,000 was transferred pursuant to Thompson's ground rule, explained earlier in the day by Criden to Amoroso and Weinberg, that money was not to be discussed. At the very start of the meeting, Criden says, "Frank understands the situation." Criden then ceremoniously lifts the briefcase from a table to his right and places it between himself and Thompson without any conversation by anyone concerning the briefcase or its contents. Amoroso says "There's the briefcase," pointing to it. Thompson then says to Criden, "You look at that for me will you?" The visual impact is of people handling and talking about a briefcase containing something of

importance, not simply drafts of documents for a lawyer's perusal. Thompson's knowledge that the briefcase contained money is supported by several circumstances. Later in the conversation Amoroso said the morning conversation had been "shadow boxing," to which Thompson replied, "Well, you have to be careful." The next day Criden told Cook that he had handed Thompson $20,000 of the $50,000 in the briefcase. Still later Thompson told Congressman Murtha that there would be $50,000 in "walking around money" for Congressmen willing to help.

The petition for rehearing is denied.

UNITED STATES of America, Appellee,

v.

Michael O. MYERS, Angelo J. Errichetti, Louis C. Johanson, and Howard L. Criden, Defendants-Appellants.

No. 251, Docket 82-1172.

United States Court of Appeals, Second Circuit.

Argued Oct. 7, 1982.

Decided Oct. 29, 1982.

APPENDIX A

Defendants appealed from an order of the United States District Court for the Eastern District of New York, George C. Pratt, J., denying their motion for an extension of time to file a notice of appeal from the denial of their motion for new trial. The Court of Appeals held that the District Court did not abuse its discretion in concluding that excusable neglect had not been shown; if defense counsel's affidavit was read to imply that preoccupation with oral argument of the main appeal was the reason for the late filing of notice of appeal from the new trial ruling, that claim was undermined by defendants' explicit consideration of the new trial ruling in their efforts to persuade the Court of Appeals to postpone oral argument of the main appeal; moreover, a government letter alerted defendants to the need for a timely notice of appeal from the new trial ruling at a time when the ten-day period had not run.

Affirmed.

APPENDIX A

1. Criminal Law 1081(6), 1147

A district court's decision denying an extension of time to file a notice of appeal cannot be reversed unless the court abused its discretion in concluding that excusable neglect has not been shown. F.R.A.P. Rule 4(b), 28 U.S.C.A.

2. Criminal Law 1081(6)

District court, which denied motion to extend the time for filing a notice of appeal from order denying defendants' motion for new trial, did not abuse its discretion in concluding that excusable neglect had not been shown; if defense counsel's affidavit was read to imply that preoccupation with oral argument of the main appeal was the reason for the late filing of notice of appeal from new trial ruling, that claim was undermined by defendants' explicit consideration of the new trial ruling in their efforts to persuade the Court of Appeals to postpone oral argument of the main appeal. F.R.A.P. Rule 4(b), 28 U.S.C.A.

APPENDIX A

3. Criminal Law 1081(6)

Court of Appeals has no authority to enlarge the time for filing a notice of appeal. F.R.A.P. Rule 26(b), 28 U.S.C.A.

APPENDIX B

CONSTITUTION

Amend. 5

AMENDMENT V-CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

18 USCS §2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(June 25, 1948, ch 645, §1, 62 Stat. 684; Oct. 31, 1951, ch 655, §17b, 65 Stat. 717.)

APPENDIX D

18 USCS § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to-

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the

APPENDIX D

Controlled Substances Act [21 USCS §802(b)]), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

(Added Sept. 13, 1961, P.L. 87-228, §1(a), 75 Stat. 498; July 7, 1965, P.L. 89-68, 79 Stat. 212; Oct. 27, 1970, P.L. 91-513, Title II, Part G, §701(i)(2), 84 Stat. 1282.)

APPENDIX E

BRIBERY **18 USCS §201**

§201. Bribery of public officials and witnesses

(a) For the purpose of this section:

"public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending,

or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent-

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United states; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts,

solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(d) Whoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself there-

APPENDIX E

from; or

(e) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom-

> Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public

APPENDIX E

official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom; or

APPENDIX E

(i) Whoever, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given or to be given by him as a witness upon any such trial, hearing, or other proceeding, or for or because of his absence therefrom-

> Shall be fined not more than $10,0000 or imprisoned for not more than two years, or both.

(j) Subsections (d), (e), (h), and (i) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such

opinion, and in appearing and testifying.

(k) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title [18 USCS §§1503, 1504, 1505].

(Added Oct. 23, 1962, P.L. 87-849, §1(a), 76 Stat. 1119; Sept. 22, 1970, P.L. 91-405, title II, §204(d)(1), 84 Stat. 853.)

APPENDIX F

CHAPTER 19. CONSPIRACY

18 USCS §371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, ch 645, §1, 62 Stat. 701.)

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FILED
MAY 12 1983
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Nos. 82-1183, 82-1187, 82-1199, 82-1240, and 82-1255

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND F. LEDERER, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN M. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK THOMPSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

HOWARD L. CRIDEN, PETITIONER

v.

UNITED STATES OF AMERICA

MICHAEL O. MYERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government must have probable cause to suspect a member of Congress of a crime, or of a predisposition to commit a crime, before it conducts an investigation of him and videotapes his meetings with undercover agents.

2. Whether the Due Process Clause barred petitioners' convictions for offenses relating to bribery because the unlawful payments were offered by undercover government investigators, because a government informant allegedly urged certain petitioners to be as explicit as possible in stating what they would do in return for the illegal payments, or because the informant allegedly engaged in misconduct that did not prejudice petitioners.

3. Whether the government improperly concealed exculpatory evidence, so that certain petitioners' convictions should be reversed.

4. Whether a ready response to an undercover agent's offer of an illegal payment can be sufficient to establish predisposition, and thereby defeat petitioner Lederer's entrapment defense.

5. Whether petitioner Murphy's conviction should be reversed because of error in the supplemental instruction given to the jury.

6. Whether the district court gave too unfavorable an instruction on petitioner Thompson's credibility as a witness at his own trial.

7. Whether evidence of a meeting between petitioner Myers and undercover agents, occurring after the illegal payment was made to petitioner Myers, was improperly admitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1183

RAYMOND F. LEDERER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1187

JOHN M. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1199

FRANK THOMPSON, JR., PETITIONER

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No. 82-1255

MICHAEL O. MYERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-83a)[1] is reported at 692 F.2d 823. The opinion of the district court (Pet. App. 84a-249a) is reported at 527 F. Supp. 1206. The opinion of the court of appeals on an interlocutory appeal by petitioner Myers (Pet. App. 250a-272a) is reported at 635 F.2d 932. The opinion of the court of appeals on an interlocutory appeal by petitioners Murphy and Thompson (Pet. App. 273a-282a) is reported at 642 F.2d 699.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1982. The petitions for rehearing were denied on November 17, 1982. The petitions for a writ of certiorari in Nos. 82-1183, 82-1187 and 82-1199 were filed on January 14, 1983; the petitions in Nos. 82-1240 and 82-1255 were filed on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

Petitioners were convicted, in three jury trials in the United States District Court for the Eastern District of New York, of offenses arising out of what is known as the Abscam investigation.

1. In the course of this investigation, Melvin Weinberg, an FBI informant, acted as the representative of a fictitious organization supposedly backed by two wealthy Arab sheiks seeking to invest their money in the United States. Petitioner Errichetti, the mayor of Camden, New Jersey, and a New Jersey state senator, contacted Weinberg in connection with investments in casinos then being built in Atlantic City, New Jersey. The district court found that "Errichetti claimed to have extraordinary influence in obtaining gambling casino licenses, power over the commissioners who issued the licenses, connections with organized crime, ability to deal in narcotics, guns and counterfeit

[1] "Pet. App." references are to the appendix to the petition in No. 82-1199.

securities, as well as intimate knowledge of which members of the New Jersey legislature could be [bo]ught." Pet. App. 93a-94a.

At one meeting Errichetti, Weinberg, FBI undercover agent Amoroso, who was also posing as a representative of the sheiks, and petitioner Criden, an attorney brought to the undercover agents by Errichetti, discussed problems that might arise if a revolution occurred in the sheiks' country and they wanted to seek asylum in the United States.[2] As the district court found, "[i]mmediately after this conversation Errichetti and Criden formed an alliance in which they undertook to produce for Amoroso and Weinberg public officials who, in return for money, were willing to use their influence with the government on the sheiks' behalf." Pet. App. 95a.

Specifically, Criden told his law partners, petitioner Johanson and Ellis Cook (who testified for the government under a grant of immunity), that if they arranged meetings between Congressmen and the sheiks or their representatives, $100,000 would be paid to each Congressman and shared with the person who arranged the meeting. Johanson then contacted petitioner Myers, who was a member of the House of Representatives. Myers and Errichetti met with Weinberg and Amoroso in a hotel room; the FBI recorded the meeting on videotape. Pet. App. 16a-17a.[3] The court of appeals described the meeting as follows (*id.* at 17a):

> Early in the conversation, Myers boasted of his influence in Congress. When Amoroso mentioned his [earlier] conversation * * * with Errichetti concerning the sheiks' possible immigration problems, Myers replied, "Absolutely. Where I could be of help in this type of matter, first of all, is private bills that

[2] Errichetti and Criden travelled to Florida for this meeting. Pet. App. 94a-95a.

[3] This meeting was held at Kennedy Airport, in the Eastern District of New York. Petitioners travelled from New Jersey and Pennsylvania to attend. Pet. App. 17a.

can be introduced." Myers explained that delay was important in immigration matters and said, "[I]f I wanta keep somebody in the country, all I do is introduce a private bill." Later in the conversation, Amoroso told Myers that his employer was planning major investments in the United States, possibly including something in Philadelphia. Myers agreed with Amoroso that such an investment in his district would give him "a little protection," and added that it would provide a reason to go "full force and, ah, not that I won't otherwise," and the "perfect opportunity to raise hell before Congress." At the end of the meeting Amoroso handed Myers an envelope containing $50,000 in $100 bills. Amoroso said, "Spend it well"; Myers replied, "Pleasure."

The money in the envelope was divided among Myers (who received $15,000), Errichetti (who received $15,000), Criden, Johanson, and Cook. At a subsequent meeting among Myers, Criden, and two other undercover agents who were posing as representatives of the sheiks, Myers complained about the small size of his payment. *Id.* at 18a.

Myers, Errichetti, Criden, and Johanson were each indicted on three counts: conspiracy to defraud the United States and to violate 18 U.S.C. 201, which prohibits bribery of public officials, in violation of 18 U.S.C. 371; bribery and aiding and abetting bribery, in violation of 18 U.S.C. 201 and 2; and travelling in interstate commerce to carry on the unlawful activity of bribery, in violation of 18 U.S.C. 1952.[4] They were tried together,

[4] Petitioner Myers unsuccessfully moved to dismiss the indictment, then appealed the denial of that motion. The court of appeals rejected, on the merits, his claims: that 18 U.S.C. 201 violates the Speech or Debate Clause of the Constitution, Article I, Section 6, Clause 2 (Pet. App. 258a, citing *United States* v. *Brewster*, 408 U.S. 501 (1972), and *United States* v. *Johnson*, 383 U.S. 169 (1966)); that his indictment was invalid because it alleged an agreement to perform a legislative act in return for a bribe (Pet. App. 259a, citing *United States* v. *Brewster*, *supra*); that Congress, acting under its Article I, Section 5, Clause 2 power to "punish its

and Myers, the only one of the four to testify, explained that he was only "playacting"; that is, "Myers * * * claimed that Weinberg had told Errichetti, and Errichetti had told Myers, that nothing would ever have to be done for the sheiks in connection with immigration. According to Myers, Errichetti told him just prior to the [first] meeting what he should say to impress the sheik's representatives. Myers claimed that he did not intend to fulfill any of the promises he made at the meeting." Pet. App. 19a. Over the government's objection, the district court instructed the jury that it should convict only if it found that Myers was not "playacting." *Ibid.* All of the defendants were convicted on all counts.[5]

2. Petitioner Lederer, another member of Congress, was also contacted by Johanson. According to Cook's testimony, Johanson said that he had explained the sheiks' feared immigration problems to Lederer and had told Lederer that the sheiks' representatives insisted that the Congressman accept the money personally, presumably in order to ensure that he would be obligated to the sheiks. Lederer and Errichetti met in a hotel room at Kennedy Airport with Weinberg and Amoroso; this meeting was also recorded on videotape. Pet. App. 19a. The

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Members for disorderly Behavior," has exclusive jurisdiction to punish bribery (Pet. App. 260a, citing *United States* v. *Brewster*, *supra*, and *Burton* v. *United States*, 202 U.S. 344, 367 (1906)); that Section 201 should not be interpreted to permit prosecutions growing out of undercover investigations like Abscam (Pet. App. 262a-267a); that Section 201 did not reach Myers' alleged conduct because the subject of the legislative act he promised to take was fictitious (*id.* at 267a-268a, citing *United States* v. *Brewster*, *supra*, 408 U.S. at 526-527); and that some level of suspicion, such as probable cause, should have been required before he was investigated (Pet. App. 269a-270a). This Court denied certiorari. 449 U.S. 956 (1980).

[5] Errichetti and Criden were each sentenced to concurrent terms of six years' imprisonment and fines totalling $40,000. Myers and Johanson were each sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000. Pet. App. 9a.

court of appeals described this meeting as follows (*id.* at 19a-20a):

> Lederer said that Errichetti had briefed him on the sheik's immigration problems. When Amoroso said, "I understand that you can introduce legislation," Lederer replied, "Right, a bill. Private bill. Sure." Lederer then raised a concern that people might ask, "Why all at once does a Philadelphia Congressman want to help somebody . . .?" * * * At the end of the meeting, Amoroso handed Lederer a bag containing $50,000 in $100 bills, commenting, "I hope you don't mind a brown paper bag with this in" and adding, "I hope you spend it well."

Criden distributed this money, giving Cook an envelope containing $5,000 marked "RL" (for petitioner Lederer), and telling Cook that Errichetti had taken $20,000 and Criden and Johanson $15,500. Johanson subsequently passed the $5,000 to Lederer. Approximately five months later, FBI agents interviewed Lederer about the meeting; Lederer denied that Errichetti was present, denied that private immigration bills had been discussed, and denied that he had received a package or a brown paper bag. Pet. App. 20a.

Lederer, Errichetti, Johanson, and Criden were each indicted on four counts. Three paralleled the counts of the Myers indictment; the fourth charged that Lederer, aided and abetted by the others, received an illegal gratuity in violation of 18 U.S.C. 201(g). Errichetti, Johanson, and Criden were severed after they were convicted in the Myers prosecution. At trial, Lederer acknowledged that he had received $5,000 of the $50,000 handed him by Amoroso. His only defense was that he had been entrapped. He was convicted on all counts and sentenced to three years' imprisonment and fines totalling $20,000. Pet. App. 9a-10a.

3. Petitioner Thompson, then a Representative from New Jersey, was introduced to Criden by Joseph Silvestri, a New Jersey businessman, after Criden asked Silvestri

about Congressmen who would be willing to meet with the sheiks' representatives. Criden told Weinberg that Thompson had agreed to cooperate and would meet with Weinberg and Amoroso. At approximately the same time, Criden also explained to Cook, his law partner, that arrangements had been made so that Thompson would not have to accept the money personally. Thompson, Criden, Weinberg, and Amoroso held a videotaped meeting on October 9, 1979, to discuss private immigration bills and their usefulness in delaying deportation. When Amoroso mentioned money, Thompson insisted that he was not interested in receiving money but continued to give assurances that he would do whatever he could to help the sheiks. The meeting ended with no money having been exchanged. Pet. App. 21a.

Later in the same day, Criden alone returned for another meeting with Weinberg and Amoroso. The court of appeals described this videotaped meeting (Pet. App. 21a-22a):

> Criden complained that at the morning session Amoroso had altered their agreement, which, he claimed, called for no mention of money and Criden simply receiving a package. Weinberg and Amoroso denied making such an arrangement, stating that they were willing to have Criden take the package as long as Thompson acknowledged the money. Criden demurred, arguing that Thompson was too experienced and suspicious and could not be expected to act like Myers and Lederer. Criden agreed to talk with Thompson and telephoned to arrange a meeting with the Congressman.

In the evening of that same day, Thompson and Criden met again with Amoroso. Criden said "Frank [Thompson] understands the situation." Amoroso replied, "There's the briefcase" and pointed to a briefcase containing $50,000 in cash. Thompson then said to Criden either "You look after that for me will you?" or "You look at that for me will you?"; the tape is indistinct. Pet. App. 22a; see *id.*

at 2a. The discussion turned to investments, and Thompson said that investments by the sheik in his district "would put him in a position to justify his support of the sheik." *Id.* at 22a. At another point, Amoroso, recalling the morning conversation, said that they had then been "shadow boxing," to which Thompson replied, "Well, you have to be careful." *Ibid.* At the end of the meeting, both Thompson and Criden momentarily lifted the briefcase, and Criden carried it away. Criden subsequently reported to Cook that Thompson had taken $20,000 of the money. *Ibid.*

During the meeting on the evening of October 9, Thompson said he might send his "pal," petitioner Murphy, a Congressman from New York, to meet with the sheiks' representatives. Pet. App. 22a. Thompson then met with Murphy and arranged for him to meet Criden, and on October 20, 1979, Murphy and Criden met Weinberg and Amoroso at a videotaped meeting,[6] which the court of appeals described as follows (*id.* at 23a):

> The discussion centered on the sheik's anticipated immigration problems. Amoroso said that his employers felt it was worth "whatever they have to put out" to obtain assistance. Amoroso explained that his employer had said, "[T]ake the money, go find the people that can, can do this for me." Criden replied, "All you have to do is get a hold of me. I will get a hold of Jack [Murphy]." Later, Weinberg said, commenting on the apparent absence of any problem, "As long as the man says he's going to take care of it. That's what counts." Murphy answered, "Yeah." Weinberg then made clear that it would be a "different deal" if any help was needed for anyone other than the two employers that had been mentioned. "[I]n other words," Amoroso explained, "these, what we're, what we're coming up front with, the money for is just for these two guys." Murphy answered,

[6] This meeting was also held at Kennedy Airport, and the money was taken to New Jersey and Pennsylvania to be distributed. Pet. App. 23a-24a.

> "Yeah." At the end of the meeting Amoroso picked up a briefcase containing $50,000 in $100 bills. Criden said, "Why don't you give that to Jack." Murphy said, "Howard [Criden] why don't you take care of that."

The court of appeals also stated that the jury could have concluded that Murphy said "Howard why don't you take care of that for me?" *Id.* at 23a n.6.

Criden later told Cook that Thompson was to be given $25,000 of this money, of which $15,000 was Murphy's share; Thompson telephoned Criden and arranged a meeting, and after the meeting Criden told Cook he had delivered the money to Thompson. When questioned by FBI agents about his meetings with Weinberg and Amoroso, Thompson denied that immigration matters had been discussed and denied that anyone had received a briefcase. Pet. App. 24a, 25a.[7]

Subsequently, Amoroso took Murphy aside at another videotaped meeting described by the court of appeals (Pet. App. 25a):

> In this conversation Murphy acknowledged the dangers of speaking about money * * *. Murphy told Amoroso, "[A]ny time money's mentioned where a public official is mentioned, there—there's automatically an ability to link 'em to something illegal or to taking a consideration for something, uh, that he's supposed to do or use his office to do and there's, no public official would ever be involved in anything like

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[7] Subsequent events involving Representative John Murtha of Pennsylvania, who received no money and was not indicted, are also relevant to the Thompson and Murphy prosecutions. Thompson gave Murtha's name to Criden and suggested that Murtha was a candidate to meet with the sheiks' representatives. Murtha testified at trial that Thompson had told him, in conversations on the House floor, "that there would be $50,000 in 'walking around money' for Congressmen willing to help" wealthy Arabs who might need assistance on immigration matters. Thompson also told Murtha that he had enlisted Murphy in the enterprise. Pet. App. 24a.

> that . . . Particularly Thompson, myself, or Murtha.[8] We'd never do anything like that. See?" Amoroso said, "[Y]ou're being coy with me." Murphy said, "Sure." Then when Amoroso said he had been reluctant to give Murphy money, Murphy said, "You didn't, you didn't give me any money. . . . I never, received any money from anyone." The conversation continued with the two discussing future plans for Murphy to meet the sheik.

Thompson and Murphy were indicted (together with Criden and Silvestri, who were subsequently severed) on five counts—bribery, conspiracy, and interstate travel charges paralleling those of the Myers indictment; an unlawful conflict of interest, consisting of the receipt of money "as compensation for services to be rendered before departments, agencies and officers of the executive branch of the Government" in an immigration matter involving foreign nationals, in violation of 18 U.S.C. 203(a); and receipt of an unlawful gratuity, in violation of 18 U.S.C. 201(g). Pet. App. 10a-11a.[9] The basis of the substantive charges against Thompson was his receipt of money exchanged at the October 20 meeting; the October 9 meeting was used as evidence of the conspiracy.

Thompson testified in his own behalf and denied receiving any money. Pet App. 25a. Murphy neither testified nor called any witnesses; his defense, argued in summation, was that he had not received any money. *Id.* at 25a-26a. The interstate travel count was dismissed by the district court. Thompson was convicted of conspiracy, bribery, and receipt of an unlawful gratuity; he was acquitted of unlawful conflict of interest. Murphy was convicted of conspiracy, conflict of interest, and receipt of

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[8] See page 9 note 7, *supra*.

[9] Petitioners Thompson and Murphy took an interlocutory appeal from the denial of their motion to dismiss the indictment. The court of appeals affirmed (Pet. App. 273a-282a), holding that their claims were controlled by its holdings on petitioner Myers' interlocutory appeal. See pages 4-5 note 4, *supra*.

an unlawful gratuity; he was acquitted of bribery. Pet. App. 11a.[10]

4. After the trial and before sentencing, the district court conducted a 16-day hearing to consider claims by all seven petitioners that their convictions should be overturned and the indictments dismissed because of various forms of government misconduct and errors at the trial. The court permitted petitioners to rely on evidence developed in other trials that grew out of the Abscam investigation. The district court denied relief, writing a comprehensive opinion. Pet. App. 84a-249a. Petitioners appealed from their convictions, and the court of appeals, also writing a comprehensive opinion, unanimously affirmed all the convictions except for petitioner Murphy's conviction of unlawful conflict of interest, which it reversed and remanded for a new trial. *Id.* at 5a-83a.

ARGUMENT

Most of the petitioners raise, in some form, two contentions applicable to the Abscam investigation generally —that it should not have been conducted without probable cause to believe that the members of Congress to whom payments were offered were guilty of, or predisposed to commit, related offenses; and that the level of government involvement violated the Due Process Clause. These contentions are without foundation in the law. Petitioners also "voice a chorus of indignation" concerning informant Weinberg (Pet. App. 50a), but they fail to show that any of their claims about Weinberg entitle them to relief. Finally, petitioners make a variety of contentions bearing on their particular cases, many of which are

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[10] Murphy was sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000. Pet. App. 11a. The effect of the court of appeals' reversal of his conviction on the conflict of interest charge (see page 11, *infra*) was to reduce his aggregate fine by $10,000. Pet. App. 83a n.37. Thompson was tentatively sentenced to the maximum terms, as required by 18 U.S.C. 4205(c) to permit further evaluation of his medical condition. Pet. App. 11a.

plainly insubstantial and all of which are of insufficient importance to warrant this Court's review.

1. Several petitioners, and amicus curiae American Civil Liberties Union, contend that the government should not be permitted to investigate members of Congress unless the government already has probable cause to believe that they have committed or are predisposed to commit the offense under investigation. See 82-1183 Pet. 9-14; 82-1199 Pet. 20-44; 82-1255 Pet. 24-27, 49-56; ACLU Am. Br. 6-7. See also 82-1240 Pet. 20-21.

We note at the outset that the government did not engage in random investigations of petitioners; each of the petitioners either approached the undercover agents of his own accord or was introduced as a person willing to engage in corrupt activities by another person who had shown his willingness to do so. See Pet. App. 27a n.7, 149a-150a. More important, however, petitioners do not suggest, and cannot suggest, that the decisions of this Court or the language of the Constitution requires that the government have any level of suspicion—much less probable cause—before undertaking an investigation of the kind at issue here. Whether petitioners' proposed restrictions on criminal investigations are desirable as a matter of policy is a question that belongs to the domain of legislation, not constitutional adjudication.

Probable cause is required only for a search or a seizure, and the videotaped investigation of petitioners did not constitute a search or a seizure. *Hoffa* v. *United States*, 385 U.S. 293 (1966), and *United States* v. *White*, 401 U.S. 745 (1971), establish that one party to a conversation may record it without invading any constitutionally protected interest of the other parties, and petitioners identify nothing in the logic of *Hoffa* or *White* suggesting that a different result should obtain when audio recording is supplemented by video recording—which can only result in a more accurate record of the events at issue. See, *e.g.*, *United States* v. *White*, *supra*, 401 U.S. at 751-753 (plurality opinion) ("If the conduct and revelations

of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking * * *. [W]e are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.").[11]

Similarly, except for one insubstantial contention by petitioner Lederer,[12] petitioners do not assert that they

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[11] Petitioner Thompson asserts (82-1199 Pet. 35-36) that in *White* the government had probable cause to believe that the defendant would engage in criminal conduct during the recorded conversation. But the Court in *White* never referred to the existence of probable cause, and the clear holding of that case is that probable cause is unnecessary.

[12] Petitioner Lederer asserts (82-1183 Pet. 22-23) that the Speech or Debate Clause precluded the government from introducing into evidence a financial disclosure statement he had filed as required by House rules. As the court of appeals explained, however (Pet. App. 58a), this statement was in no sense a contribution to a legislative debate or to any other form of legislative activity; it plainly does not fit within this Court's definition of legislative acts. See page 14, *infra*. Petitioner Lederer's only argument to the contrary is that because establishing rules like that requiring the disclosure statement "is the constitutional prerogative of the House, anything done in that regard, including the filing of reports, is shielded by the Speech or Debate Clause." 82-1183 Pet. 23. This is a non sequitur; nothing in the Constitution suggests that everything done pursuant to the internal rules of the House is "Speech or Debate." "In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. * * * The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions" (*United States* v. *Brewster*, 408 U.S. 501, 515, 528 (1972) (emphasis in original)). Nor does that Clause protect all actions performed by members of Congress "in their official capacity" (*Gravel* v. *United States*, 408 U.S. 606, 625 (1972)).

Indeed, petitioner Lederer concedes (82-1183 Pet. 23) that he could be punished for filing a false disclosure statement; this would

are being prosecuted for activities that fall within the ambit of the Speech or Debate Clause. That Clause protects only "legislative acts," and as the Court has specifically stated (*Gravel* v. *United States*, 408 U.S. 606, 625 (1972)):

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

It is entirely clear that petitioners' dealings with the undercover agents were not legislative acts; they were, at most, contacts with possible constituents, and the Court has explicitly rejected the suggestion that " 'errands' performed for constituents [or] the making of appointments with Government agencies" are legislative acts. *United States* v. *Brewster*, 408 U.S. 501, 512 (1972). In light of these settled principles, petitioners do not seriously contend that the acts for which they were prosecuted are themselves protected by the Speech or Debate Clause.

Instead, petitioners appear to assert that although the Abscam investigation and prosecution violated no identifiable constitutional provision, the combination of videotaping and the fact that some of the targets were members of Congress somehow made the investigation offen-

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not be so if such statements truly fell within the Speech or Debate Clause. We note that it is well established that members of Congress can be prosecuted for making false statements to agencies of the House of Representatives. See, *e.g.*, *United States* v. *Bramblett*, 348 U.S. 503 (1955) (false statements to House Disbursing Office); *United States* v. *Diggs*, 613 F.2d 988 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980) (false statements to House Office of Finance).

sive to constitutional values.[13] Petitioners cite no case supporting this contention, however. The only argument they advance is that any other result would create an unacceptable danger that the executive branch will harass or intimidate members of Congress for political reasons. See 82-1183 Pet. 12-13; 82-1199 Pet. 22-23; 82-1255 Pet. 25, 52-53.

We do not dispute that politically motivated investigations are improper. But petitioners do not point to, and no court has found, the slightest evidence that the investigation of petitioners was politically motivated. As the court of appeals stated, the suggestion that "the Government targeted the defendant Congressman for political or other impermissible reasons * * * is flatly contradicted by the evidence. The Government had no role whatever in the selection of any of the four Congressmen involved [here] * * *. Criden and Johanson selected Congressmen

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[13] Petitioner Murphy makes a somewhat related argument that purports to rest on the First Amendment but is in fact a challenge to the sufficiency of the evidence against him. 82-1187 Pet. 13-18. Petitioner Murphy does not contend that the act of which the jury found him guilty—"directly or indirectly ask[ing], demand[ing], exact[ing], solicit[ing], seek[ing], accept[ing], or receiv[ing], or agree[ing] to receive anything of value for himself for or because of any official act performed or to be performed by him" (18 U.S.C. 201(g))—is protected by the First Amendment. Instead, he claims that his guilt was "inferred from constitutionally protected activity" (81-1187 Pet. 14; see *id.* at 15, 16 n.15). But it is entirely permissible, and indeed commonplace, to use constitutionally protected speech as *evidence* of an element—usually a mental element—of an offense. To give an obvious example, expressions of personal animosity toward another are ordinarily protected by the First Amendment, but they can of course be used as evidence that the speaker intended to harm the person of whom he spoke.

Petitioner Murphy's First Amendment claim in fact dissolves into a contention that there was insufficient evidence of his guilt. See 82-1187 Pet. 15, 17-18. But there was abundant evidence of Murphy's guilt: for example, the references to money at the meeting, which the jury could view on videotape; the secretive way in which the payment was made, which the jury again saw; the evidence that Murphy had been briefed; and his "coy" videotaped discussion with Amoroso about the virtues of being discreet.

Myers and Lederer. Silvestri selected Congressm[a]n Thompson. Thompson selected Congressman Murphy." Pet. App. 27a n.7. Petitioners also do not explain why the danger of politically motivated investigations requires that *all* prosecutions of members of Congress resulting from investigations initiated without probable cause be barred; in any other case involving a claim that a prosecutorial decision was motivated by an impermissible purpose (see, *e.g.*, *United States* v. *Goodwin*, No. 80-2195 (June 18, 1982); *Oyler* v. *Boles*, 368 U.S. 448 (1962)), the courts would determine in a particular case, relying on rebuttable presumptions if appropriate, whether the action was improperly motivated. Moreover, videotaping would seem to reduce the threat of politically motivated investigations, by eliminating so far as possible the danger that an investigator will misunderstand or distort a target's responses.

In any event, if politically motivated *investigations* violate the Constitution, barring a *prosecution* is an irrational remedy for the violation. On petitioners' own hypothesis, the danger is that the executive branch will conduct such an investigation not in order to institute a criminal prosecution through lawful means, but in order to collect information of lawful but embarrassing acts or statements by members of Congress. Prohibiting a prosecution would, therefore, be unlikely to deter an investigation of the kind petitioners fear; such an investigation could still purport to be concerned with others associated with the member of Congress, or with civil wrongs. Indeed, the principal effect of petitioners' approach would be to benefit those members of Congress whom the executive branch in fact had legitimate reason to investigate and who were in fact willing to engage in criminal conduct.[14] See also *United States* v. *Brewster*,

[14] As the court of appeals pointed out when it considered Myers' interlocutory appeal (Pet. App. 263a): "Any Member of Congress approached by agents conducting a bribery sting operation can simply say 'No.' Each Member's capacity to reject bribe opportunities could be regarded as sufficient safeguard against the risk that

supra, 408 U.S. at 524-525 ("[F]inancial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation.").

In our view, there was nothing repugnant to constitutional values in the conduct of the Abscam investigation. The government did not tape meetings between members of Congress and their families or their close personal or political associates; it taped meetings that the targets believed to be of a purely business character between members of Congress and strangers who were seeking special treatment and who had made no secret of their willingness to spend large amounts of money to obtain it. The values of a democratic society will not be disserved if members of Congress are put on notice that, if the other parties to the meeting so desire, the members' conduct at such meetings may some day be reported, in the most accurate possible form, to the public.

2. Only petitioner Lederer claimed at trial that he was entrapped. Pet. App. 28a.[15] But several petitioners contend that the conduct of the investigation was so outrageous that their convictions must be reversed. See 82-1183 Pet. 15-19; 82-1189 Pet. 45-57; 82-1240 Pet. 13-21; 82-1255 Pet. 31-49. This contention relies on the suggestion made by some of the Justices in *Hampton* v. *United States*, 425 U.S. 484 (1976), that even if a defendant is not entrapped, government involvement in a

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the Executive Branch would successfully use these tactics for political reprisal." The court of appeals further noted (*id.* at 263a-264a) that there is no reason to doubt Congress's ability to recognize any dangers of politically motivated investigations and to take appropriate legislative action. "Once the Supreme Court decided in *Brewster* that the Constitution does not prevent Congress from applying the criminal law enforcement process to a Member's acceptance of a bribe in return for a promise of legislative action, the way was cleared for that process to function without any special constitutional restraints arising from the status of the defendant." *Ibid.*

[15] We discuss the arguments raised by petitioner Lederer in connection with his entrapment defense at pages 26-28, *infra*.

crime may reach such a level that the Due Process Clause may bar a conviction. Petitioners' principal argument in support of this contention is that the government "created" the crimes for which they were convicted rather than "detecting" independently-existing criminal conduct. See, *e.g.*, 82-1199 Pet. 19, 50; 82-1255 Pet. 34, 39-47. Petitioners also assert that the allegedly unsavory background and conduct of FBI informant Weinberg somehow caused the investigation to violate due process (*e.g.*, 82-1240 Pet. 13-21; 82-1255 Pet. 32) and that the inducements they were offered were too large (*e.g.*, 82-1255 Pet. 32, 36-37).

a. It is well settled that the government does not violate the Due Process Clause merely by providing a predisposed defendant with the means and the opportunity to commit a crime. See *Hampton* v. *United States*, *supra*; *United States* v. *Russell*, 411 U.S. 423, 435-436 (1973); *Sherman* v. *United States*, 356 U.S. 369, 372 (1958); *Sorrells* v. *United States*, 287 U.S. 435, 441 (1932). As the court of appeals explained, that is all the government did here (Pet. App. 32a; footnote omitted):

> Though the "sting" was surely elaborate, its essential characteristic was the creation of an opportunity for the commission of crime by those willing to do so. The Government produced people with fictitious identities ready to pay bribes to Congressmen. Word of the availability of bribe money was made known. From that point on, the essential conduct of the agents and their paid informant was to see who showed up to take the bribes and videotape them in the act of doing so. Whatever may be the due process limit of governmental participation in crime, it was not reached here.

The essence of due process is "fundamental fairness" (*Hampton* v. *United States*, *supra*, 425 U.S. at 492 (Powell, J., concurring)), and there is no discernible sense in which the government's role in this investigation resulted in petitioners' being treated unfairly. The investigation did no more than replicate circumstances in which a public offiical might find himself; there was no

possibility that the investigation would incriminate a public official who was not susceptible to accepting illegal payments. As the district court remarked "each [petitioner] was a willing volunteer seeking illegal and corrupt payments." Pet. App. 152a. Nor was this a case in which it might be said that the defendants were no more than minor actors in a government-operated criminal enterprise (cf. *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978)); petitioners were central figures whose refusal to engage in illegal conduct would have caused this aspect of the Abscam operation to collapse.[16]

Moreover, whatever the importance to society of exposing persons to various temptations to engage in other kinds of unlawful activity (cf. *Hampton*, 425 U.S. at 498 (Brennan, J., dissenting); *United States* v. *Twigg*, *supra*), there is a clear and important interest in exposing public officials who will accept bribes. It is surely reasonable to assume that officials will on occasion be offered illegal payments of the kind involved in this case (cf. *Hampton*, 425 U.S. at 496 n.1 (Brennan, J., dissenting) ("a reasonable * * * inquiry might be whether the accused would have obtained the contraband from a source other than the Government"); the crafty behavior of petitioners Thompson and Murphy indeed appears to be evidence that such schemes are not uncommon. At the same time, it is exceedingly difficult to discover a bribery-related offense except through undercover investigation of some form, because all of those with knowledge of the offense have a strong interest in concealing it. See Pet. App. 263a.[17] In addition, as we have noted, petitioners were not selected at random; they came to the undercover

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[16] *United States* v. *Jannotti*, 673 F.2d 578, 608-609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982)—an Abscam case—makes untenable any suggestion of a conflict between *Twigg* and the instant decision of the court of appeals.

[17] Congress itself recognized this point in its report on an investigation into alleged efforts by representatives of the Republic of Korea to buy influence. See H.R. Rep. No. 95-1817, 95th Cong., 2d Sess. 93-94 (1978).

agents through contacts that are presumably very similar to those that would be developed if an actual wealthy potential immigrant were seeking to buy influence. And as both courts below noted (Pet. App. 262a n.7, 161a-162a), petitioners' culpable acts were videotaped from start to finish so that they could be brought before the jury in the most complete and accurate fashion possible, not subject to the interpretations of the undercover agents or to contests over credibility. In these circumstances, there is no basis for concluding that the investigation transgressed the Due Process Clause.[18]

b. Petitioners Myers, Errichetti, Johanson, and Criden also argue that the government violated the Due Process Clause in its use of informant Weinberg. See 82-1255 Pet. 31-49; 82-1240 Pet. 13-21. (Petitioner Criden makes a similar argument about petitioner Errichetti. 82-1240

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[18] The court of appeals also disposed correctly of petitioners' suggestion that the inducements were so great that they violated due process. As it noted, these contentions appear to refer not to the $50,000 bribes, but to the large investments the sheiks proposed to make; and as the court explained (Pet. App. 33a):

> We have considerable difficulty with the premise of this argument, which is that a Congressman is privileged to take a $50,000 bribe so long as he simultaneously believes he is bringing the benefits of investments to his district. * * * [Moreover,] the facts of these cases belie the fanciful image of four Congressmen so anxious to bring investment benefits to their districts that they reluctantly accept bribes on which they thought the investments were conditioned. Quite to the contrary, the evidence shows four Congressmen jumping at the chance to take a bribe and discussing investments in their districts as a convenient cover to justify their rendering of purchased legislative services. As Thompson said, anticipating possible criticism for helping the sheik, "I'm in a position to say well of course I'm helping this guy. Why shouldn't I help this guy . . . his money is helping my guys work everyday." Myers put it more bluntly: an investment in the district "gives me a little protection."

In addition, the district court specifically found, in the cases of Errichetti and Criden, "no evidence to connect their motivations for these crimes with their hoped-for bonanzas if the casino project went ahead." Pet. App. 153a.

Pet. 15.) But while petitioners detail Weinberg's alleged misdeeds at some length, they fail to show—and often do not even attempt to show—that these actions amounted to a violation of petitioners' rights.[19]

For the most part, the thrust of petitioners' argument seems to be that the Due Process Clause was violated by the mere "use of a personage such as Weinberg at all to 'sting' United States Congressmen" (82-1255 Pet. 32). Even accepting petitioners' allegations about Weinberg's character and conduct, it is well established that the government must sometimes use informants with such a background; indeed, as the district court explained (Pet. App. 179a), often the authorities use an informant precisely because they hope that a careful and sophisticated criminal, who would sense (or learn, upon investigating) the inauthenticity of an undercover law enforcement officer, might regard the informant as a genuine fellow criminal. For this reason, it is not enough for petitioners to assert that Weinberg was paid by the FBI,[20] or that Weinberg frequently acted in ways characteristic of a criminal.

Nor are petitioners entitled to immunity from prosecution on the basis of their assertions that Weinberg's supervision was inadequate. See, *e.g.*, 82-1255 Pet. 32. The district court specifically found that "the supervision imposed on Weinberg was more than adequate to the circumstances of this investigation." Pet. App. 164a. Even apart from this finding, petitioners attempt to make a serious showing of prejudice in connection with only one series of actions by Weinberg—his so-called "coaching" of petitioner Myers. This "coaching" consisted, according to petitioners, of telling Myers two things: that he should

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[19] See Pet. App. 198-199a ("Throughout these trials, defense counsel sought to make Weinberg's character and activities the key issue before the juries, thus distracting from the conduct and motivations of the defendants. These issues were unsuccessful 'red herrings' at the trials, and they are 'red herrings' still.").

[20] We note that Weinberg was not paid on a contingent fee basis. Pet. App. 51a.

be vigorous in insisting to the sheiks' representatives that he had the power to help the sheiks and would use it; and that he need not actually fulfill his promise. Petitioners also urge that similar "coaching" of Senator Harrison Williams, a defendant in another Abscam prosecution whose case is not before this Court, is also relevant.

i. The first alleged element of the "coaching" consisted simply in urging the suspects to make their representations of what they were willing to do in return for cash as explicit as possible. In many ways, this made the investigation more, not less, fair to the suspects. Indeed, petitioner Murphy criticizes the government for not taking steps to obtain more unequivocal evidence of his guilt. 82-1187 Pet. 18-22.[21] A public official who was unsure about the reason he was being offered money, or who was reluctant to sell his influence, would, when told that he should boast about his power in order to obtain a payment, surely should have demurred and refused to par-

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[21] Petitioner Murphy's argument on this point is essentially that "[g]iven the simple purpose of the October 20 meeting * * * and the agents' complete control over the events," any ambiguities in the videotaped dealings should be strictly interpreted against the government's version of the events. 82-1187 Pet. 20. But as the court of appeals pointed out (Pet. App. 46a), "[u]ndercover agents offering bribes to Congressmen are entitled to simulate the guarded conversation that would be expected of those proposing an unlawful venture. * * * They need not say, 'Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action.'" See also Pet. App. 246a-247a n.17 (during another Abscam investigation, petitioner Errichetti criticized an undercover agent for being insufficiently subtle in offering a bribe to an official). This is precisely the kind of issue one would have expected petitioner Murphy to raise forcefully before the jury, and there is no reason to second-guess the jury's resolution of it.

In any event, the government did not have "complete control" of the events; it videotaped them, but government agents were only some of the parties to the conversations. We also note that after Thompson insisted that the sheik's representatives be more subtle, it was surely reasonable for the agents to believe that Thompson's "pal," Murphy, who was brought to them by Thompson, would want to operate under a similar arrangement.

ticipate further in the scheme. As the court of appeals concluded (Pet. App. 44a):

> Suggesting how easy it is to commit a crime hardly establishes a due process violation. The "coaching," if it occurred, barely qualifies as any inducement at all; if the script was supplied, no one was coerced into playing his part. Due process challenges to an undercover agent's encouragement have been rejected when one defendant was solicited twenty times before committing an offense, *United States* v. *Esquer-Gamez*, 550 F.2d 1231 (9th Cir. 1977), and when another defendant was tempted by a million-dollar cash deal and prodded by veiled threats, *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978). Whatever conduct might transgress the [Due Process Clause], * * * the facts of the Abscam investigation are not even close to the line. * * * [T]he record reveals that these Congressmen were not children of Hamelin, seduced by the piping of Melvin Weinberg.

ii. As the court of appeals also explained, it is far from clear that the other alleged form of "coaching"—telling petitioner Myers that he need not fulfill the promise he would make in return for the $50,000—was practiced in this case. See Pet. App. 34a-38a. But even assuming that it was, petitioners fail to show how such "coaching" could violate the Due Process Clause. Surely it did not place pressure on Myers to commit the offense; while it may have made the corrupt agreement more attractive to Myers because it suggested that he would not have to uphold his part of the bargain, that is scarcely the kind of inducement that might raise a question under the Due Process Clause. Indeed, the proposal that Myers take the sheik's money and then not fulfill his promise added an element of fraud beyond a simple exchange of influence for cash and should have been at least equally repulsive to an honest official.

Although petitioner Myers now contends only that the coaching violated the Due Process Clause, and does not

contend that it draws into question his guilt under the bribery statute, 18 U.S.C. 201(e), we note that the court of appeals considered and rejected the latter contention. First, as the court explained, the district judge accepted, for purposes of the trial, the contention that it would be a defense to a charge of bribery to show that the official who accepted the money had no intention of carrying out the agreement (Pet. App. 34a-35a):

> Judge Pratt * * * afforded the defendants in the *Myers* case wide latitude to present evidence in support of their claim. He then submitted the claim to the jury, under an instruction that the jury was not to convict unless the Government proved beyond a reasonable doubt that a Congressman who had accepted money in return for a promise to introduce immigration bills had done so with the intention of carrying out that promise. * * * The *Myers* jury obviously rejected the defense, and, on the evidence before them, they were certainly entitled to do so. * * * An entirely plausible inference even from the defendants' evidence, and the one the jury apparently accepted, is that Weinberg was not urging the Congressmen to utter promises they were reluctant to make and did not intend to keep, but was simply anxious to make sure that they fully and unambiguously expressed on videotape the promises they were all too ready to make and fully intended to keep.
>
> Moreover, after the trials were concluded, Judge Pratt afforded the defendants a full opportunity at the "due process" hearing to amplify the record to persuade him, as the trier of fact on the due process claim, that only a charade had occurred. After concluding a wide-ranging hearing, the District Judge found the claim unsupported as a factual matter, and his findings are not clearly erroneous.

In addition, the court of appeals concluded, after examining the language and legislative history of 18 U.S.C. 201(c), that "[w]ith respect to the bribery statute, * * * the defense of fraud is * * * unavailable. If Myers was 'playacting' and giving false promises of assistance to

people he believed were offering him money to influence his official actions, he violated the bribery statute." Pet. App. 42a-43a. We can think of no reason that Congress might have had for immunizing public officials who accept what would be a bribe but who know that they are defrauding the bribe-payer as well as the public. See also *United States* v. *Hood*, 343 U.S. 148, 151 (1952) (in construing a statute related to Section 201(c), "[w]hether the corrupt transaction would or could ever be performed is immaterial. We find no basis for allowing a breach of warranty to be a defense to corruption").

3. Petitioners Thompson and Criden claim that the prosecution improperly concealed exculpatory evidence. See 82-1240 Pet. 21-25; 82-1199 Pet. 62-65. Petitioner Criden's allegations concern only informant Weinberg; he claims that the jury was denied the opportunity "to evaluate not just Weinberg's sordid past, but the full extent of his venality during the investigation" (82-1240 Pet. 25). The district court (Pet. App. 93-98) and the court of appeals (*id.* at 52a-53a) considered these claims in detail and rejected them, showing that the petitioners were not deprived of any material information bearing on Weinberg's credibility. In addition, as both courts below noted, petitioners had ample opportunity to impeach Weinberg's credibility (*id.* at 52a, quoting *id.* at 230a-231a):

> Weinberg admitted that he had been a criminal most of his life, that he had made his living by being a con man, that he had lied and cheated and violated the law from his early teenage years, that he was a convicted felon, that he had made a deal with the government to cooperate in return for probation on his felony conviction in Pittsburgh, and that he had received substantial compensation for his cooperation in the Abscam investigation and trials.

Moreover, as the district judge, who presided at the trials, explained, these cases simply did not turn on Weinberg's credibility. Pet. App. 229a. To the extent the defendants raised serious factual issues at all, those issues concerned the interpretation of allegedly ambiguous acts and

statements made by petitioners. The jury was able to resolve these ambiguities by themselves viewing the acts and listening to the statements, which the government had recorded, and petitioners fail to show how the additional evidence that they assert the government should have uncovered and revealed would have helped them persuade the jury on the questions that were central to the case. Petitioner Criden's principal argument, for example, appears to be only that the additional evidence would have persuaded the jury "to reject Weinberg's denial that he orchestrated a charade in the *Myers* case" (82-1240 Pet. 22); but as we have explained, demonstrating the existence of a "charade" would not have been a defense.

Petitioner Thompson's claim (82-1199 Pet. 62-63) is that the government improperly concealed the "immunity" granted to Congressman Murtha, who testified against him (see page 9 note 7, *supra*). But not only was no immunity granted to Congressman Murtha; the question whether the likelihood of his being prosecuted would affect his credibility was fully aired at trial. The parties stipulated at trial that the government had "no present intention of prosecuting Congressman Murtha" (Tr. 2783),[22] and that stipulation was read to the jury. Petitioner Thompson's counsel stated that that stipulation was "fully acceptable on behalf of Mr. Thompson" (*ibid.*). The district judge, when he instructed the jury, reminded them of this stipulation and warned that Congressman Murtha's testimony should be considered "carefully" (Tr. 3081).

4. Petitioner Lederer, the only one of the petitioners who requested an entrapment instruction, appears to claim (82-1183 Pet. 19-22) that the government introduced insufficient evidence of his predisposition to commit the offenses charged. As the district court and the court of appeals explained, Lederer's prompt response to the offer of a bribe—his "ready complaisance" as Judge

[22] We rely on the brief filed by the United States Attorney in the court of appeals for citations to the transcript.

Learned Hand termed it (*United States* v. *Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933), quoted at Pet. App. 207a)—was ample evidence of predisposition:

> In seeking only $5,000 for himself out of the $50,000 he received, Lederer displayed neither the greed of Myers nor the guile of Thompson and Murphy; nevertheless, the evidence at his trial fully entitled the jury to find his predisposition beyond a reasonable doubt. Predisposition may be established by "the accused's ready response to the inducement." The videotape of the September 11 meeting reveals Lederer responding with alacrity. As he assured the sheik's representatives, "I'm not a Boy Scout."

Pet. App. 29a-30a; citations omitted. See *id.* at 207a-208a.

Petitioner Lederer appears to urge (82-1183 Pet. 20-21) that only past evidence of criminal activity and not just an eager response to a government offer can possibly establish predisposition, but he fails to cite anything in an opinion of this Court, or in logic, that supports such a rule. Nor, contrary to the heading in his petition (*id.* at 19), does he cite any decision of a lower federal court that has embraced such a rule; on the contrary, courts have consistently rejected it. See, *e.g.*, *United States* v. *Jannotti*, 673 F.2d 578, 604 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982) (citing cases).

Petitioner Lederer also urges (82-1183 Pet. 24-25) that this Court resolve what he describes as a conflict among the credits on the question whether a defendant must admit the acts charged, in order to have an entrapment defense submitted to the jury. Specifically, petitioner Lederer suggests that he wished to claim both that he was entrapped and that he was receiving only a legal campaign contribution. But the jury in Lederer's case was given an entrapment instruction (Pet. App. 107a); and Lederer never attempted or offered to testify at trial that he was receiving only a campaign contribution (*id.* at 50a & n.20). Nothing in the district court's opinion, the court of appeals' opinion, or the law of the Second

Circuit [23] suggests that Lederer would have been barred from offering both defenses if he had sought to do so; and having not sought to do so at trial, he certainly cannot now invoke a supposed conflict among the circuits on an issue not implicated in his case.

5. Petitioners assert that the courts below committed a number of other errors, but in no instance do they show why these claims raise issues requiring this Court's review. For example, petitioner Murphy's principal contention (82-1187 Pet. 5-13) is that a supplemental instruction given by the district court in response to the jury's written question was incorrect. Since this was not even a standard instruction but one devised by the district court in an effort to clarify the particular matter about which the jury inquired, it is clear that there is no need for this Court to review the court of appeals' decision that the district court did not err.

In any event, petitioner Murphy's highly attenuated argument on this point is insubstantial. The district judge initially instructed the jury: " 'It is for you to determine based on all of the evidence whether the Government has established beyond a reasonable doubt that the money in the briefcase transferred from Amoroso to Criden on October 20 [the date of the meeting among Amoroso, Weinberg, Criden, and Murphy] was for the benefit of and *eventually received* by defendant Murphy or defendant Thompson or both.' " Pet. App. 62a (emphasis added by the court of appeals). This instruction was given in connection with the bribery charge, but the district court told the jury that it applied to the "re-

[23] The Second Circuit has permitted a defendant raising an entrapment defense to assert his innocence on other grounds, so long as he "did not take the stand to deny personally his participation in the transaction and did not affirmatively introduce any other evidence that he was not involved." *United States* v. *Valencia*, 645 F.2d 1158, 1172 (2d Cir. 1980). See also *United States* v. *Mayo*, No. 82-1256 (2d Cir. Apr. 8, 1983), slip op. 2976; *United States* v. *Williams*, No. 82-1111 (2d Cir. Apr. 5, 1983), slip op. 2841-2842 n.5.

ceipt" element of the unlawful gratuity and conflict of interest counts as well. *Ibid.* Petitioner Murphy does not object to this instruction. 82-1187 Pet. 7.

During its deliberations, the jury sent the following inquiry to the judge:

> Some members of the jury feel it is possible that defendant Murphy took "direction & control" of the briefcase however momentarily by instructing Criden to take physical possession, making Criden the "executor" of the money in a sense at that point.
>
> May we construe this to be in satisfaction of element one of Count 2 in lieu of "*eventually*[*"*] receiving the money at some later time?

Pet. App. 63a-64a (emphasis by the jury). After an extended discussion with counsel, the district judge responded to the question. His supplemental instruction, reproduced at 82-1187 Pet. App. 97a-99a, began by reminding the jury that the central question was whether Murphy received the money. The district judge then noted that the jury emphasized "eventually," and said that he interpreted the question to be asking whether the receipt *must* have been "eventually, and not then, October 20th," at the meeting. *Id.* at 98a.

The judge answered this question by saying:

> [M]y answer to you is that in applying this element to the defendant Murphy, you may disregard the term eventually. It is for you to evaluate what was said, what happened, what all the circumstances were, and determine from that whether the defendant Murphy received the money.

82-1187 Pet. App. 98a. The district judge immediately added that "[i]t is absolutely critical * * * that he would have to know that it was money that was in the briefcase. * * * [C]ertainly if you should find that he did not know that there was money in that briefcase while that was going on, then unquestionably you should find him not guilty on all the substantive charges." *Ibid.* The district judge then summed up: "If you are talking simply about

the temporal aspect of this, the timing now as opposed to eventually, the answer is yes. You may construe those circumstances to be receipt of this money on or shortly after October 20, 1979" (*id.* at 98a-99a). After the jury resumed its deliberations, Murphy's counsel made the single objection that the judge may have left it unclear at one point that the government had the burden of proof; the district court immediately recalled the jury and clarified that point. *Id.* at 99a-101a.

The jury's inquiry referred specifically to count two, charging bribery, on which petitioner Murphy was acquitted. His counsel never requested the district judge to clarify the relationship between the supplemental instruction and the other counts. See Pet. App. 66a n.24.

Moreover, petitioner Murphy does not point to a single sentence of the instruction that misstated the law. It appears that petitioner Murphy would have interpreted the question differently, to be asking about the relationship that had to exist between Criden and Murphy in order to find that Murphy received the money on October 20.[24] Also, petitioner Murphy in retrospect (although he did not so indicate at the time) apparently would not have reemphasized the point that he was not guilty if he did not know the briefcase contained money, although that was a central contention of his defense (see Pet. App. 65a, 67a; 82-1187 Pet. App. 88a). But at least so long as the district judge did not misstate the law, these were plainly matters to be confided to his discretion, subject to the review of the court of appeals. That court found that "Judge Pratt's handling of the episode was admirable under the circumstances." Pet. App. 68a.

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[24] On this point the court of appeals noted (Pet. App. 67a-68a): Counsel had ample opportunity after hearing both the substance of Judge Pratt's proposed response and the delivery of the response to suggest additional language explicating constructive possession. If the jury's approximation of the concept evident from the text of their inquiry required refinement, the opportunity for amplification was available to the defendants both before and after the instruction was given.

b. Petitioner Thompson contends (82-1199 Pet. 58-61) that the district court, although acting in accordance with established Second Circuit precedent, gave too harsh an instruction on his credibility as a witness. Even petitioner Thompson's own account shows that the judge's statement that Thompson, because he was a defendant, had a motive to testify falsely, was immediately balanced by the statement that " 'it by no means follows that he's not capable of telling the truthful, straightforward story' " (*id.* at 59). In addition, the district judge pointed out that the jury should "consider that [a defendant] takes a real risk by taking the stand and subjecting himself to cross-examination" (Tr. 3055).[25] See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973) (invoking "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge").

The cases cited by petitioner Thompson, far from supporting him, show the incorrectness of his contention. In *Hicks* v. *United States*, 150 U.S. 442, 452 (1893), the Court strongly suggested that an instruction pointing out that a defendant who testified had a motive to lie would *not* be sufficient to warrant the reversal of a conviction. In *Reagan* v. *United States*, 157 U.S. 301 (1895), the Court upheld an instruction that drew the defendant's credibility into question at least as sharply as the district court's charge in this case; immediately after the passage quoted by petitioner Thompson (82-1199 Pet. 60-61), the Court stated (157 U.S. at 310-311):

> On the other hand, the court may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony. * * * [T]he

[25] See page 26 note 22, *supra*.

court may charge the jury that the peculiar and deep interest which the defendant has in the result of the trial is a matter affecting his credibility, and to be carefully considered by them.

In *Taylor* v. *United States*, 390 F.2d 278, 284-285 (8th Cir. 1968), the court carefully distinguished between its holding—that the judge could charge a jury that the defendant had a peculiar interest in testifying falsely—and its suggestion that trial judges might wish to avoid such a charge. *United States* v. *Saletko*, 452 F.2d 193, 197-198 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972), followed *Taylor* in both respects.

c. Finally, petitioners Myers, Errichetti, and Johanson challenge (82-1255 Pet. 56-64) the district court's admission of evidence of the videotaped meeting among Myers, Criden, and two FBI undercover agents posing as the sheik's representatives, at which Myers complained about the small size of his share of the $50,000 handed to him at the earlier meeting. Petitioners contend that this evidence should not have been admitted because that meeting occurred after the meeting at which the money was passed and the criminal transaction consummated. But it is entirely clear that Myers' subsequent remarks were relevant, because they "illuminat[ed] the nature of the conspiracy" (Pet. App. 56a) between the sheik's representatives and petitioners. Indeed, as the court of appeals noted (Pet. App. 56a), these conversations were in fact part of the conspiracy charged in the indictment (although the district court, in an excess of caution, instructed the jury otherwise) and were therefore fully admissible on that ground. Moreover, it is far from clear that evidence of an inculpatory *statement* like Myers'—that constitutes only an admission or an explanation of a prior act—is evidence of "other crimes, wrongs, or acts" within the meaning of Fed. R. Evid. 404(b). In any event, that rule, on its face, permits evidence of "other crimes, wrongs, or acts" to be admitted for such purposes as "proof of motive, * * * intent, * * * plan [or] knowl-

edge"; the rule does not distinguish between acts committed prior to the alleged crime and subsequent acts.

Petitioners urge that *United States* v. *Boyd*, 595 F.2d 120 (3d Cir. 1978), stands for the proposition that evidence of subsequent acts may not be used. But the panel in *Boyd* narrowly limited its ruling. It suggested that the subsequent acts evidence was being used only to show bad character; it specifically distinguished several cases that permitted evidence of subsequent acts to be admitted; and it explicitly stated that its holding was not inconsistent with *United States* v. *Laurelli*, 293 F.2d 830 (3d Cir. 1961), cert. denied, 368 U.S. 961 (1962). In *Laurelli*, the court of appeals upheld the admission of evidence of an offer of a bribe that occurred after the bribe attempt for which the defendant was indicted, on the ground that it "tended to show * * * intent" (*id.* at 832). The court also noted that "[w]e have held in a number of cases that evidence of similar acts subsequent to the one being tried is admissible" (*ibid.*). Indeed, Judge Hunter concurred in *Boyd* on the explicit understanding that the court had not held that evidence of subsequent crimes was generally inadmissible. See 595 F.2d at 126-127.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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